TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1909

No. [redacted]59

J. M. MILLER, PLAINTIFF IN ERROR,

vs.

AMERICAN BONDING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE [redacted] CIRCUIT.

FILED [redacted], 1909.

(27,691)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1920.

No. 346.

C. E. MILLER, PLAINTIFF IN ERROR,

vs.

AMERICAN BONDING COMPANY.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., NOVEMBER 29, 1920.

1 In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

UNITED STATES OF AMERICA to the Use of CÆSAR FRANCINI; C. E. MILLER, Intervening Plaintiff,

vs.

MARK P. WELLS and AMERICAN BONDING COMPANY.

1. *Docket Entries.*

Feb.	4, 1914.	Præcipe for summons in assumpsit. Returnable sec. leg.
"	" "	Plaintiff's statement and exhibit.
"	" "	Summons issued, returnable fourth Monday in February next.

2

Feb.	20, 1914.	Præcipe for appearance of R. W. Archbald for C. E. Miller, intervening plaintiff.
"	21, "	Petition of C. E. Miller for leave to intervene and be made a party plaintiff.
"	" "	Order thereon granting the prayer of the petition; statement of claim to be filed in twenty days.
"	23, "	Præcipe for appearance of Welles & Torrey and F. B. Bracken, attorneys for American Bonding Company.
"	24, "	Summons returned served as to American Bonding Company and N. E. I. as to Mark P. Wells.
"	26, "	Affidavit of defense of American Bonding Company as to claim of Cæsar Francini.
March	5, 1914.	Petition and order granting The Pennsylvania Marble and Granite Co. leave to intervene and be made a party plaintiff in this action.
"	10, "	Motion and decree transferring cause from law to the equity side of the court.
"	14, "	Statement of claim of C. E. Miller amounting to $1,248.40.
"	17, "	Notice to file affidavit of defense to statement of C. E. Miller within fifteen days and acceptance of service thereon.

3

March	20, 1914.	Petition and order granting leave to O. W. Uhrich, and B. H. Uhrich, co-partners trading as the Atchison Revolving Door Co., to intervene as parties plaintiff, statement to be filed within 20 days.

April	3, 1914.	Bill of complaint of Atchison Revolving Door Co., an intervenor.
"	" "	Bill of complaint of Pennsylvania Marble Co., an intervenor.
"	11, "	Petition and order granting leave to Voska, Foelsch and Sidlo, Inc., to intervene as party plaintiff.
"	" "	Petition and order granting leave to John A. Pisani and Piero L. Pisani to intervene as parties plaintiff.
"	29, "	Intervening complaint of Voska, Foelsch and Sidlo, Inc.
"	" "	Intervening complaint of John A. Pisani and Piero L. Pisani, co-partnership.
"	" "	Order that case be proceeded with at law and not in equity.
May	27, 1914.	Affidavit of defense (of American Bonding Co., to claim of C. E. Miller.)
Aug.	15, 1914.	Affidavit of defense of American Bonding Company as to claim of Pisani Brothers.
"	" "	Affidavit of defense of American Bonding Company as to claim of Voska, Foelsch & Sidlo.

4

Oct.	12, 1914.	Affidavit of defense of American Bonding Company as to claim of Pennsylvania Marble & Granite Co.
"	" "	Affidavit of defense of American Bonding Company as to claim of Atchison Revolving Door Company.
March	29, 1915.	Jury called and sworn.
April	1, 1915.	Verdict in favor of plaintiff as follows: Cæsar Francini, $975.87; Pisani Brothers, $1,575; Voska, Foelsch & Sidlo, Inc., $12,550; Atchison Revolving Door Co., $1,022; Pennsylvania Marble & Granite Company, $26,200.
"	5, "	Reasons and rule for a new trial.
"	27, "	Exceptions by American Bonding Company to right of C. E. Miller to have a separate trial, and order thereon that case be left off of trial list until Circuit Court of Appeals passes upon the questions raised on trial heretofore.
Dec.	16, "	Order denying new trial and directing judgment to be entered on verdict.
"	" "	Judgment in favor of Cæsar Francini for $975.87, with interest from April 1, 1915; Pisani Bros., $1,575, interest from April 1, 1915; Voska, Foelsch & Sidlo, Inc., $12,550, interest

5

from April 1, 1915; Atchison Revolving Door Co., $1,022, interest from April 1, 1915, Pennsylvania Marble & Granite Co., $26,200, interest from April 1, 1915.

Dec.	24, 1915.	Assignments of error on behalf of the American Bonding Company.
"	" "	Writ of error allowed.
Jan.	10, 1916.	Writ of error issued.
Feb.	29, "	Bill of exceptions filed.
July	22, "	Mandate from Circuit Court of Appeals, reversing judgment in favor of Pennsylvania Marble & Granite Company.
Sept.	21, "	Satisfaction of judgment in favor of Voska, Foelsch & Sidlo.
"	" "	Satisfaction of judgment in favor of Pisani Bros.
"	" "	Satisfaction of judgment in favor Cæsar Francini.
Nov.	14, "	Satisfaction of judgment in favor of Atchison Revolving Door Company.
Feb.	17, 1917.	Præcipe and order to mark suit of Pennsylvania Marble & Granite Company discontinued settled, and ended on payment of Clerk's costs.
Nov.	4, 1918.	Præcipe to place case of C. E. Miller on trial list at Harrisburg, Pa.
Jan.	13, 1919.	Exceptions of American Bonding Company to claim of C. E. Miller and rule to show cause why case should not be stricken off the list, returnable January 29, 1919.

6

April	10, "	Opinion making rule to strike off absolute.
May	26, "	Assignments of error by C. E. Miller filed.
"	" "	Petition for appeal and citation allowed.
June	9, "	Appeal bond in the sum of $250 approved.
"	" "	Citation dated May 26th, issued; returnable in thirty days.
"	" "	Writ of error issued.

2. *Statement of Claim of Cæsar Francini, Bringing Suit on Contractor's Bond.*

In the District Court of the United States for the Middle District of Pennsylvania.

UNITED STATES OF AMERICA to the Use of CÆSAR FRANCINI and Other Creditors of MARK P. WELLS, Plaintiff,

vs.

MARK P. WELLS and AMERICAN BONDING COMPANY, Defendants.

The plaintiff, Caesar Francini above named, brings this action in the name of the United States of American for his own use and on behalf of all other creditors situated similarly to himself.
7 complaining of the defendants, alleges upon information and belief:

1. That at all the times hereinafter mentioned, he was and still is a citizen and resident of the City, County and State of New York, and the United States of America.

2. That at all the times hereinafter mentioned, the defendant, Mark P. Wells, was and still is a citizen and resident of the City of Philadelphia, County of Philadelphia, State of Pennsylvania, and the United States of America, and was engaged in business as M. P. Wells.

3. That at all times hereinafter mentioned, the defendant, the American Bonding Company, was and still is a corporation organized and existing under the laws of the State of Maryland.

4. That on or about the 6th day of October, 1910, the defendant, Mark P. Wells, under the name and style of M. P. Wells, entered into an agreement with the United States of America, wherein and whereby he promised to furnish all the labor and materials necessary for the construction of a certain Post Office at York, in the State of Pennsylvania, in accordance with certain plans and specifications furnished by the United States of America.

5. That thereafter the said agreement was on or about the 24th day of February, 1912, by the United States of America and the said defendant, Wells, modified by the said defendant, Wells, agreeing to make certain changes in the said construction of the Post Office and agreeing to furnish additional material, for which changes and additional material the said United States of America agreed to pay.

8

6. That on or about the 6th day of March, 1912, the plaintiff, Cæsar Francini, entered into an agreement with the defendant, the said Mark P. Wells, wherein and whereby he agreed to furnish certain labor and material for the construction of certain marble work on the premises set forth in paragraph "Fourth" of this complaint, and in consideration thereof the said defendant, Mark P. Wells, agreed to pay to him therefor the sum of Twenty-six Thousand, Two Hundred and Fifty ($26,250) Dollars, which sum was the reasonable value for said labor and materials, and that on or about the 28th day of January, 1913, at the special instance and request of the defendant, Mark P. Wells, the said plaintiff performed certain work, labor and services, and furnished certain material in the doing of certain slate work and postmaster stair treads, of the reasonable value and agreed price of One Hundred and Ninety-seven ($197) Dollars.

7. That this plaintiff duly performed all the conditions of the said agreement on his part to be performed and duly furnished the said materials as required by said agreement, save and except that the said work, labor and services were not performed and materials furnished, and said contract completed by September 1st, 1912, as in said contract provided, owing to delays occasioned by the said defendant, Mark P. Wells, in not completing the work preceding the

work to be done on said premises by the said plaintiff, Cæsar
9 Francini, and which delay was waived by the said defendant, Mark P. Wells.

8. That the said labor and the said materials were part of those required to be furnished by the defendant, Mark P. Wells, in pursuance of his contract with the United States of America, and were actually used in the prosecution of the work provided for in the contract referred to in paragraph "Fourth" of this complaint, and were accepted *by* the defendant, Mark P. Wells, by the United States of America.

9. That on or about the 10th day of October, 1910, the defendant, said Mark P. Wells, as principal, and the defendant, the American Bonding Company, as surety, made and delivered to the United States of America, their bond in writing, under their hands and seals, wherein and whereby they bound themselves in the penal sum of One Hundred and Twenty Thousand ($120,000) Dollars, for the full observance and performance by the said defendant, Mark P. Wells, of all the conditions and agreements of the contract referred to herein in paragraph "Fourth," and they did further undertake by said bond that the defendant, Mark P. Wells, should promptly make full payments to all persons supplying him labor and materials in the prosecution of the work provided for in said contract.

10. That on or about the 26th of March, 1912, the said defendant, Mark P. Wells as principal, and the said defendant, the American Bonding Company, as surety, consented to the above modification mentioned in the "Fifth" paragraph of this complaint and
10 agreed to remain bound upon the bond mentioned in the "Ninth" paragraph of this complaint in the penal sum of One Hundred Twenty Thousand ($120,000) dollars and that the said defendant, Wells, and the American Bonding Company did further undertake in the said consent executed the 26th day of March, 1912, that the defendant Mark P. Wells would promptly make payments to all persons supplying material or labor in connection with any of the said work provided for in said contract and said modification.

11. That no part of the said sum of Twenty-six Thousand, Four Hundred and Forty-seven ($26,447) Dollars has been paid (which amount is referred to in paragraph "Fifth" herein), except the sum of Eleven Thousand, Forty-three and 01/100 ($$11,043.01), and there is still unpaid and owing to the plaintiff the sum of Fifteen Thousand, Four Hundred and Three and 99.100 ($15,403.99) Dollars, which has been duly demanded from the defendants.

12. That the six months have elapsed since the completion and final settlement of the contract entered into by and between the defendant, Wells, and the United States of America, set forth in paragraph "Fourth" herein, and no suit has been brought by the United States of America on said contract or bond heretofore mentioned. and that the affidavit required by Statute has been duly made, and upon making application to the Treasury Department, under the di-

rection of which said work was prosecuted, plaintiff has procured a certified copy of said contract and bond, and has duly complied in all respects with the Statute in such cases made and provided.

11 Wherefore, the plaintiff, Cæsar Francini, demands judgment against the defendant for the sum of Fifteen Thousand Four Hundred and Three and 99.100 ($15,403.99) Dollars with interest, together with costs, and disbursements of this action.

KATZ & SOMMERICH,
Solicitors for Plaintiff.

15 William Street, New York City.

WILLIAM M. HARGEST,
Harrisburg, Pa.,
Resident Counsel.

Filed Feb. 4, 1914.

3. *Bond in Suit.*

Know all men by these presents,

That we, Mark P. Wells, of the City of Philadelphia, County of Philadelphia and State of Pennsylvania, principal, and American Bonding Company, of Baltimore, of the City of Baltimore, and State of Maryland, surety, are held and firmly bound unto the United States of America in the sum of One Hundred and Twenty Thousand ($120,000) Dollars, lawful money of the United States, for the payment of which, well and truly to be made to the United States, we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 10th day of October, A. D. 1910.

The condition of the above obligation is such,

That Whereas, the said Mark P. Wells has entered into a certain contract, hereto attached, with the United States, bearing
12 date the 6th day of October, A. D. 1910: Now, if the said Mark P. Wells shall well and truly fulfill all the covenants and conditions of said contract, and shall perform all the undertakings therein stipulated by him to be performed, and shall well and truly comply with and fulfill the conditions of and perform all of the work and furnish all the labor and materials required by any and all such changes in or additions thereto, notice thereof to the said surety being thereby waived, and shall promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by said contract, then this obligation to be void; otherwise, to remain in full force and virtue.

In Witness Whereof, the said Mark P. Wells, principal, and the American Bonding Company of Baltimore, surety, have hereunto subscribed their names and fixed their seals, the day and year first above written.

(Signed) MARK P. WELLS. [SEAL.]

Signed, sealed and delivered in the presence of:
(Signed) B. K. BRAUN.
RUSH A. PLOWMAN.

(Signed) AMERICAN BONDING COMPANY OF BALTIMORE.
By SHERMAN F. SCHWEILER. [SEAL.]

Attest:
FRANCIS T. COVERLY,
[SEAL.] *Local Asst. Secretary.*

13 4. *Petition of C. E. Miller to Intervene.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

UNITED STATES OF AMERICA to the Use of FRANCINI

vs.

M. P. WELLS.

To the Honorable Charles B. Witmer, District Judge:

The petition of C. E. Miller respectfully represents that he is a creditor of the said M. P. Wells defendant, to the amount of $1,248.40, with interest, for brick furnished to the said M. P. Wells for the United States post office building at York, Pennsylvania, which material went into the construction of the same in pursuance of the contract of the said M. P. Wells with the United States government for the erection of a post office building, at York, Pennsylvania. That the said post office building was completed by the said M. P. Wells, and final settlement made on August 2, 1913, and that your petitioner has not been paid for the said material. The petitioner being entitled to the benefit of the bond given by the said M. P. Wells in pursuance of the Act of Congress in such case made and provided, on which bond suit has been brought in this Court to the above stated number and term, prays leave to intervene therein in his own behalf and be made a party thereto and have his rights and claims adjudicated in such action and judgment rendered thereon.

C. E. MILLER.

Filed Feb. 21, 1914.

14 5. *Order of Court Allowing C. E. Miller to Intervene.*

Now, February 21st, 1914, on petition of C. E. Miller setting forth that he is a creditor of M. P. Wells for material furnished for the post office building at York, Pennsylvania, which went into the construction of the same and as such creditor is entitled to the benefit of

the bond on which suit is brought in this case, leave is hereby given to the said C. E. Miller to intervene and be made a party to such action or his own behalf and to have his rights and claims adjudicated therein. A statement of his claim to be filed within twenty (20) days from entry hereof.

J. W. THOMPSON,
District Judge, Specially Presiding.

6. *Statement of Claim of C. E. Miller, Intervening Plaintiff.*

In the District Court of the United States for the Middle District of Pennsylvania, Feb. Term, 1914.

No. 600.

UNITED STATES OF AMERICA to the Use of CÆSAR FRANCINI and C. E. MILLER, Intervening Plaintiff.

vs.

M. P. WELLS and THE AMERICAN BONDING COMPANY.

C. E. Miller, intervening on his own behalf in this case, makes the following statement of claim:

15 On October 6, 1910, M. P. Wells, defendant above named, entered into a contract with the United States government to construct a post office building at York, in the Middle District of Pennsylvania, in accordance with the specifications and drawings of the Supervising Architect of the United States Treasury Department, for the construction thereof, a certified copy of which said contract has been filed in this case by Cæsar Francini, by whom this suit was instituted, to which copy of contract as so filed, reference is hereby made to have the same effect as though fully and at large set forth herein.

On October 10, 1910, the said M. P. Wells, as principal, and the American Bonding Company, a corporation of the State of Maryland, as surety, gave bond to the United States as required by said contract, in accordance with the statute in such case made and provided, in the sum of $120,000, conditioned among other things that the said M. P. Wells should promptly make payment to all persons supplying labor or materials in the prosecution of the work contemplated by the said contract with the said United States government, a certified copy of which said bond has also been filed by the said Cæsar Francini in this case, to which copy of bond as so filed reference is hereby made to have the same effect as though the said bond were fully and at large set forth herein.

On or about February 24, 1912, certain modifications of the agreement between the said M. P. Wells and the United States government were made, and certain changes in the construction of the said post office building were agreed to, and thereupon the said the American Bonding Company, as surety for the said M. P. Wells, consented

thereto and agreed to remain held and bound on the said bond
16 for $120,000.

On October 29, 1910, at the special instance of the said M. P. Wells, the said C. E. Miller agreed to furnish and supply to the said M. P. Wells so much brick as should be needed in the construction of the York post office building, and thereafter from November 14, 1910, until February 18, 1911, inclusive, from time to time as required by the said M. P. Wells, in varying quantities, delivered to the said M. P. Wells, at the site of the said post office building, 317,000 hard brick, which brick were used by the said M. P. Wells in the prosecution of the said contract with the United States government and went into the construction of the said post office building.

The price agreed upon for the said brick was $5.20 per 1,000, delivered, and the total amount due therefor by the said M. P. Wells to the said C. E. Miller is $1,648.40, on which on January 24, 1911, the said M. P. Wells paid $400, leaving a balance unpaid of $1,248.40, with interest thereon from February 18, 1911, the date of the last delivery. A copy of the account against the said M. P. Wells for the said brick, taken from the books of original entry of the said C. E. Miller, duly verified, is hereto attached and made a part of this claim.

The sum of $1,248.40, with interest aforesaid, is justly due and owing to the said C. E. Miller by the said M. P. Wells, which sum the said M. P. Wells, though often requested so to do, has hitherto neglected to pay.

On August 2, 1913, the said M. P. Wells having fully completed and performed his said contract with the United States government for the construction of the said post office building, the said the United States government made a final settlement with the
17 said M. P. Wells therefor. Whereupon the said M. P. Wells, as principal, and the said the American Bonding Company, as surety, became liable on the said bond to the said C. E. Miller and to all other parties who supplied the said M. P. Wells with labor or materials in the prosecution of the work provided for in the said contract of the said M. P. Wells with the said the United States government.

Wherefore the said C. E. Miller demands of the said M. P. Wells and the American Bonding Company the sum of $1,248.40, with interest from February 18, 1911.

JAMES G. GLESSNER,
R. W. ARCHBALD,
Attorneys for C. E. Miller, Intervening Plaintiff.

March 11, 1914.

Nov.	14,	1910,	1,000	hard	brick,	at	$5.20	$5.20
"	15,	"	8,000	"	"	"	"	41.60
"	16,	"	12,000	"	"	"	"	62.40
"	17,	"	4,000	"	"	"	"	20.80
"	18,	"	6,000	"	"	"	"	31.20
"	19,	"	9,000	"	"	"	"	46.80
"	21,	"	3,000	"	"	"	"	15.60
"	22,	"	7,000	"	"	"	"	36.40
"	23,	"	8,000	"	"	"	"	41.60
"	24,	"	8,000	"	"	"	"	41.60
"	25,	"	6,000	"	"	"	"	31.20
"	26,	"	10,000	"	"	"	"	52.00
"	28,	"	8,000	"	"	"	"	41.60
"	29,	"	7,000	"	"	"	"	36.40
"	30,	"	8,000	"	"	"	"	41.60
18								
Dec.	1,	"	8,000	"	"	"	"	41.60
"	2,	"	10,000	"	"	"	"	52.00
"	3,	"	12,000	"	"	"	"	62.40
"	5,	"	4,000	"	"	"	"	20.80
"	7,	"	1,000	"	"	"	"	5.20
"	8,	"	4,000	"	"	"	"	20.80
"	9,	"	2,000	"	"	"	"	10.40
"	19,	"	10,000	"	"	"	"	52.00
"	20,	"	7,000	"	"	"	"	36.40
"	27,	"	6,000	"	"	"	"	31.20
"	28,	"	8,000	"	"	"	"	41.60
"	29,	"	14,000	"	"	"	"	62.40
"	30,	"	12,000	"	"	"	"	72.80
"	31,	"	9,000	"	"	"	"	46.80
Jan.	5,	1911,	2,000	"	"	"	"	10.40
"	6,	"	3,000	"	"	"	"	15.60
"	10,	"	7,000	"	"	"	"	36.40
"	11,	"	13,000	"	"	"	"	67.60
"	12,	"	12,000	"	"	"	"	62.40
"	14,	"	4,000	"	"	"	"	20.80
"	16,	"	2,000	"	"	"	"	10.40
"	17,	"	6,000	"	"	"	"	31.20
"	18,	"	4,000	"	"	"	"	20.80
"	19,	"	8,000	"	"	"	"	41.60
"	20,	"	7,000	"	"	"	"	36.40
"	21,	"	6,000	"	"	"	"	31.20
"	26,	"	1,000	"	"	"	"	5.20
"	27,	"	2,000	"	"	"	"	10.40
"	28,	"	6,000	"	"	"	"	31.20
"	30,	"	1,000	"	"	"	"	5.20
Feb.	8,	"	4,000	"	"	"	"	20.80
"	13,	"	4,000	"	"	"	"	20.80
"	14,	"	3,000	"	"	"	"	15.60
"	16,	"	1,000	"	"	"	"	5.20

19

Feb. 17, 1911,	4,000	"	"	"	"	.....	20.80
" 18, "	5,000	"	"	"	"	.....	26.00
	317,000		Total			.....	$1,648.40
Jan. 24, 1911, cr. by check						.....	$400.00
Balance due Oct. 31, 1913						.....	$1,248.40

STATE OF PENNSYLVANIA,
County of York, ss:

C. E. Miller, being duly sworn according to law, deposes and says that the foregoing statement of account is a true and correct copy of his books of original entries, and that the amount of $1,248.40, which is there shown to be due, is due and owing from M. P. Wells, the defendant, and that there are no offsets, deductions, or credits on the said account other than what is there shown.

(Signed) C. E. MILLER.

Sworn and subscribed to before me this 11th day of March, A. D. 1914.

(Signed) JOHN A. STOVER,
Notary Public.

My commission expires February 21st, 1915.

Filed March 14, 1914.

20 7. *Affidavit of Defense of American Bonding Company.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

UNITED STATES OF AMERICA to the Use of CÆSAR FRANCINI and C. E. MILLER, Intervening Plaintiff,

vs.

MARK P. WELLS and THE AMERICAN BONDING COMPANY.

STATE OF MARYLAND,
County of Baltimore, ss:

George L. Radcliffe, being duly sworn according to law, deposes and says that he is an officer of the defendant, the American Bonding Company, being President thereof, and that the said Company has a full, complete and adequate defense to the claim of C. E. Miller, intervening plaintiff, of the following nature and character, to wit:

Deponent is informed and believes, and expects to prove at the

trial of this case, that the said C. E. Miller, on or about October 29th, 1910, as averred in his Statement of Claim, made an agreement with M. P. Wells to furnish and supply to the said Wells so much brick as should be needed in the construction of the York post office
21 building; that it was a part of said agreement that the bricks so to be furnished by the said Miller should, in quality and all other particulars, be like a sample theretofore submitted by the said Miller for approval of the supervising architect having in charge the erection of the said building for the United States government, and that the bricks so to be furnished should be such as to meet with the approval of the said supervising architect, or his assistants, representing him in supervising the erection of the said building.

That, pursuant to said agreement, the said Miller furnished from time to time, on and after November 14, 1910, 295,000 bricks for the said building, which were in accord with the said sample and were approved by the said supervising architect, but did not furnish 317,000 bricks for the said building, as alleged in his said Statement of Claim, and that after furnishing the said 295,000 bricks as aforesaid, the said Miller delivered to the said building for use therein certain additional bricks, which were not in accord with the said sample and which were condemned as not fit for use therein by the said supervising architect and his assistants; that after the said bricks were so condemned, the defendant failed and refused to substitute others therefor and neglected and refused to furnish the remaining brick needed for the completion of the said building by the said Wells.

That in consequence of the said Miller's aforesaid breach of his contract, the said Wells was thereupon obliged to purchase 479,000 bricks for the completion of the said building from another person and was obliged to pay therefor the sum of $6.50 per thousand
22 as the lowest price at which he could then obtain them, said price being $1.30 per thousand in excess of the rate at which the said Miller had agreed as aforesaid to furnish all the bricks needed in said building; that, therefore, the said Wells sustained damage and loss amounting to $622.70 in the purchase of the said bricks needed to complete the said building, in consequence of the breach of his aforesaid contract by the said Miller. That in addition to the said loss the said Wells sustained an additional damage amounting to upwards of One Thousand ($1,000) Dollars in consequence of the delays and inconveniences in the carrying of the said building to completion by reason of the refusal, in breach, of his aforesaid agreement on the part of the said Miller to furnish all the bricks needed for the completion of the said building.

Deponent further avers that by reason of the defects in the said Statement of Claim of the said Miller, the defendant is not required to file an affidavit of defense thereto, said statement being deficient in the following, among other particulars:

(*a*) That no copies of the several agreements referred to in the said statement were ever served upon the defendant, the American Bonding Company, by the said plaintiff, or by the use plaintiff, the said Cæsar Francini.

(*b*) While the said statement alleges modifications of the agreement between M. P. Wells and the United States government therein referred to, it fails to show in what manner the said modifications were made and in what manner assented to, as alleged by the defendant, the American Bonding Company.

(*c*) Said Statement of Claim fails to aver whether the
23 alleged agreement between M. P. Wells and C. E. Miller relied upon was an agreement written or verbal.

(Signed) GEORGE L. RADCLIFFE.

Sworn to and subscribed before me this 23rd day of May, 1914.

WILLIAM A. BULLOCK,
Notary Public.

Filed May 27, 1914.

8. *Verdict.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

PENNSYLVANIA MARBLE & GRANITE COMPANY

vs.

MARK P. WELLS and AMERICAN BONDING COMPANY.

And now, to wit, April 1st, 1915, we, the jurors impanelled in the above entitled case, find in favor of the Pennsylvania Marble & Granite Company, in the sum of $26,200.00.

(Signed) JOHN F. GELWICKS,
Foreman.

And now, to wit, first day of April, 1915, we, the jurors impanelled in the above entitled case, find in favor of the United States to the use of the following, to wit:

To the use of Cæsar Francini, in the sum of $975.87;
24 To the use of Pisani Brothers, in the sum of $1,575.00;
To the use of Voska, Foelsch & Sidlo, Inc., in the sum of $12,550.00;
To the use of the Atchison Revolving Door Company, in the sum of $1,022.00.

(Signed) JOHN F. GELWICKS,
Foreman.

9. *Exceptions of American Bonding Company to Separate Trial of Claim of C. E. Miller.*

February Term, 1914.

No. 600.

THE UNITED STATES OF AMERICA to the Use of CÆSAR FRANCINI and Other Creditors of MARK P. WELLS and C. E. MILLER, Intervening Plaintiff,

vs.

MARK P. WELLS and THE AMERICAN BONDING COMPANY.

MIDDLE DISTRICT OF PENNSYLVANIA, *ss:*

To the Honorable Charles B. Witmer, District Judge of the Court of the United States for the Middle District of Pennsylvania:

The American Bonding Company and Mark P. Wells, defendants, except to the right of C. E. Miller to have a separate trial of
25 his portion of the action against the defendants at Sunbury, Pennsylvania, in the District Court aforesaid, for the reason

First. That there was a trial had in the District Court of the United States for the Middle District of Pennsylvania, at which trial all parties intervening should have made known their claims and had them tried in the said action. The cases tried at that time were those of the intervening creditors of Pisani Brothers, Voska, Foelsch & Sidlo, incorporated, and Pennsylvania Marble & Granite Company and others, claiming either under one or more of the said use-plaintiffs. The issue has been made up in the action or portion of the said action of C. E. Miller, and his right should have been tried in the said action at Scranton, and it is too late now to order the case down for trial in a separate action. Under the statute under which this suit was brought and these intervening creditors came in, it provides that "only one such action shall be brought, and it shall be instituted and conducted in point of notice and otherwise that demands of that class may be adjudicated therein and included in a single recovery."

Second. Under the same statute, "if the the recovery on the bond shall be inadequate to pay the amounts due to all of the said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery," and the whole language indicates that there can be but one trial and one recovery.

Third. C. E. Miller, the intervening creditor, has caused his case to be placed upon the trial list for trial at Harrisburg in the week beginning May 3rd, and if the court should be satisfied that
26 a trial can be had by the said C. E. Miller, it imposes a great burden on the defendants, requiring witnesses to be brought

from distont points, and double expense added to the defendants, and the act of Congress did not contemplate such a condition.

Fourth. The rule is pending in the District Court to show cause why a new trial should not be granted, which has not yet been heard, and we respectfully call the attention of the court to this fact, and say that there should be no trial of the Miller action until the court has passed upon the rule for a new trial. If a new trial is granted, the said C. E. Miller can appear and be heard, an no injury will be done to the defendants in the imposition of additional costs.

And for the reason above set forth, we respectfully ask the court to strike the said case from the trial list at Sunbury or Williamsport.

AMERICAN BONDING COMPANY,
By its Attorneys, WELLES & TORREY.

9½. *Order of Court.*

April 26, 1915. This case to be left off the trial list until the Circuit Court of Appeals has decided upon the questions raised on trial heretofore.

CHARLES B. WITMER,
District Judge.

10. *Order Entering Judgment on Verdict.*

And now, December 16, 1915, after hearing argument of counsel, and on due consideration, the motion for a new trial is
27 denied. The clerk is directed to enter judgment on the verdict in favor of the plaintiffs and against the defendant, as follows:

In favor of the United States to the use Cæsar Francini in the sum of $975.87, with interest from April 1, 1915; to the use of Pisani Brothers in the sum of $1,575.00, with interest from April 1, 1915; to the use of Voska, Foelsch & Sidlo, Inc., in the sum of $12,550.00, with interest from April 1, 1915; to the use of the Atchison Revolving Door Company in the sum of $1,022.00, with interest from April 1, 1915, and to the use of the Pennsylvania Marble & Granite Co. in the sum of $26,200.00, with interest from April 1, 1915.

To which an exception is noted for the defendants.

By the Court.

CHARLES B. WITMER,
District Judge.

11. *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Middle District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between the United States of America to the use of Cæsar Francini and other creditors of Mark P. Wells, doing business under the firm name of M. P. Wells, vs. Mark P. Wells and American Bonding Company, a manifest error hath happened, to the great damage of the said Mark P. Wells and American Bonding Company, as by their complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

28

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the tenth day of January, in the year of our Lord, one thousand nine hundred and sixteen.

G. C. SCHEUER,
Clerk of the District Court of the United States.
By S. W. HOFFARD,
Deputy Clerk.

Allowed by
CHARLES B. WITMER,
District Judge.

29

12. *Mandate from Circuit Court of —— on Reversal of Judgment Appeals.*

UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States to the Honorable the Judges of the District Court of the United States for the Middle District of Pennsylvania, Greeting:

Whereas, lately in the District Court of the United States for the Middle District of Pennsylvania, before you, or some of you, in a cause between American Bonding Company, Plaintiff in Error (defendant below), and United States of America to the use of Cæsar Francini and other creditors of Mark P. Wells, doing business under the firm name of Mark P. Wells, defendants in error, a verdict or judgment was duly entered in the said District Court on the first day of April, 1915, as follows:

"Verdict in favor of the Pennsylvania Marble & Granite Company, Intervening Plaintiff, and against the defendant, in the sum of twenty-six thousand, two hundred ($26,200) dollars. As by the inspection of the transcript of the record of the said District Court, which was brought into the United States Circuit Court of Appeals for the Third Circuit, by virtue of a writ of error agreeably to the act of Congress, in such case made and provided, more fully and at large appears.

And whereas, in the present term of March, in the year of Our Lord one thousand nine hundred and sixteen, the said cause
30 came on to be heard before the said United States Circuit Court of Appeals on the said transcript of record, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said District Court in this cause in favor of the Pennsylvania Marble & Granite Company be and the same is hereby reversed, with costs; and that the said plaintiff in error, American Bonding Company, recover against the defendant in error, the Pennsylvania Marble & Granite Company, in the sum of fifty-nine and 20-100 dollars ($59.20), for its costs herein expended, and for execution therefor.

Philadelphia, June 16, 1916.

13. *Petition of American Bonding Company to Strike the Claim of C. E. Miller from Trial List.*

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania.

The petition of the American Bonding Company, one of the defendants above named, respectfully shows:

1. That the above entitled action was brought in the name of the United States at the instance of Cæsar Francini, under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905 (Ch. 778, 33 Stat. 811), upon a bond executed by the defendant, Mark P. Wells, as principal, and
31 the petitioner as surety, in connection with a contract between said Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells for material and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller, and on April 1, 1915, a verdict was rendered by the jury in favor of the said plaintiffs who made proof as aforesaid, and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said cause.

That judgments in favor of the said plaintiffs were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely, the Pennsylvania Marble & Granite Company, which was reversed and a new
32 trial ordered in respect to the claim of the said Pennsylvania Marble & Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble & Granite Company took an appeal from the said United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made between the petitioner and the said Pennsylvania Marble & Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all the judgments entered as aforesaid in favor of the said plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble & Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of said Pennsylvania Marble & Granite Company and secured a release of all liability from said company.

That as a result of said payments and settlements, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble & Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plaintiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right
33 of the said C. E. Miller to have such separate trial of his claim, and does now except to such separate trial, upon the following grounds:

(*a*) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery.

(*b*) That a separate trial of the case of the said C. E. Miller at this late date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of establishing the defense of the claim of the said C. E. Miller set out in the affidavit of defense heretofore filed by petitioner to said claim.

(*c*) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the whole case at the discretion of this court, and as he failed to obtain such continuance and did not present his claim as hereinabove averred at the said trial, he has lost all right to require the petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establish his claim made herein.

Wherefore, your petitioner prays that an order be made striking
the said case of C. E. Miller from the trial list of this court.
34 And your petition will ever pray, etc.

F. B. BRACKEN,
CHARLES H. WELLES,
Attorneys for Petitioner.

STATE OF MARYLAND,
County of Baltimore, ss:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing petition are true and correct to the best of his knowledge, information and belief.

GEORGE L. RADCLIFFE.

Sworn to and subscribed before me this 9th day of January, A. D. 1919.

[SEAL.] KATHARINE C. McGRATH,
Notary Public.

My commission expires May 3, 1920.

14. *Rule to Show Cause.*

Now, January 13, 1919, rule is granted on plaintiff to show cause why the case on the trial list shall not be continued and to show cause why the case shall not be stricken off the list. Returnable to argument list January 30th, 1919, 2 p. m.

(Signed) CHARLES B. WITMER,
District Judge.

35 15. *Answer of C. E. Miller to Rule to Show Cause.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

THE UNITED STATES to the Use of FRANCINI et al.

vs.

MARK P. WELLS AND THE AMERICAN BONDING COMPANY.

To Honorable Charles B. Witmer, United States District Judge:

C. E. Miller, intervening plaintiff, makes answer to the petition and rule of the American Bonding Company, defendant, as follows:

1. There is nothing in the said petition which entitles the said defendant to the relief asked for or warrants a denial to the said plaintiff of the right to have his claim heard and disposed of by the court and a jury in the regular way.

2. On April 27, 1915, on exceptions of the said defendant to the right of the said plaintiff to have a separate trial, it was ordered by the court that the case should be left off the trial list until the Circuit Court of Appeals had decided upon the question raised at the trial of the claims of other intervening plaintiffs, thereby reserving to the respondent the right to a trial after a decision by the said
36 Circuit Court of Appeals, which has now been made.

3. Upon the reversal of the judgment of this court by the Circuit Court of Appeals as to the claim of the Pennsylvania Marble & Granite Company, the case was sent back to this court for a new trial, at which trial the present claimant would be entitled to be heard, if he so desired; and the American Bonding Company, defendant, could not by any settlement of the claim of the Pennsylvania Marble & Granite Company prevent such a trial.

4. The judgment entered on the several verdicts recovered in this case should have been for the penal sum named in the bond, to be released upon the payment of the various claims in suit; and had

such judgment been entered, the present claimant would in any event have had opportunity to come in and make good his claim.

5. There is nothing in the statutes under which these proceedings are had which required the present claimant to submit proof of his claim along with the other intervening plaintiffs at the trial heretofore had.

The said petition and rule should therefore be dismissed.

JAMES G. GLESSNER,
R. W. ARCHBALD,
Attorneys for C. S. Welles, Intervening Plaintiff.

Filed January 29, 1919.

37 16. *Opinion of Court.*

CHARLES B. WITMER, *District Judge:*

This action was brought under the Act of August 13, 1894 (C. 280, 28 Stat. 278), as amended by the Act of February 24, 1905 (C. 778, 33 Stat. 811), to recover upon the bond given by the contractor for the construction of the post office building, at York, Pennsylvania. It was instituted in the name of the United States by sub-contractor, Francini, in which he was joined by seven other persons claiming for material and labor furnished in the construction and completion of the building. Among the intervening claimants was one C. E. Miller, who when the case was called for trial, after issue joined and the usual publication of the list, refused and neglected to submit his claim for adjudication without apparent reason or excuse. The trial proceeded and after submission of the intervening creditor's claims, excepting Miller, the jury returned a verdict, in favor of the several interveners respectively, aggregating less than the penalty named in such bond. Final judgment was afterwards entered upon the verdict. Almost four years have since elapsed. The intervening creditor, Miller, now comes and insists on submission and trial in respect of his claim.

The defendants contend that he is too late; having failed to present his claim upon the trial his opportunity has passed; that he is not entitled, under the statute, to a separate trial after final judgment has been entered in the case.

While the several intervening creditors have admittedly respectively and distinctively independent causes of action, Title
38 Guaranty Co. vs. Crane, 219 U. S. 35, do they have, under the statute, the right to several trials by jury? We think not. The statute in its general scope contemplates one trial, or submission for adjudication of all the intervening claims in order that its provisions may be harmoniously carried into effect. The action provided is on the bond for the recovery of the penalty which stands primarily for the protection of the government, and then for distribution among the creditors of the remaining part of the penalty after

the satisfaction of the government's demand. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due to the United States, the remainder shall be distributed pro rata among said interveners. It is quite clear that it was intended that the rights of all parties intervening should be determined and adjudicated in one trial and by one judgment, otherwise the rights of the several plaintiffs and defendants could not be determined and adjudicated, as provided. U. S. vs. McGee, 171 Fed. 207.

The obligation of the surety as fixed by the bond is enforced in a single proceeding, Bryant Co. vs. N. Y. Steam Fitting Co., 235 U. S. 337, for the benefit of the several claimants prosecuted to final judgment and execution. Such proceeding, or action, as was said by Mr. Justice Van Deventer, in United States vs. Congress Construction Co., 222 U. S. 199, "shall be so instituted and conducted, in point of notice and otherwise, that all demands of that class may be adjudicated therein and included in a single recovery." This, I take it, implies a single trial and consequent judgment, and furnishes sufficient authority for the conclusion reached.

39 When this case was set down for trial and in due time tried Miller was afforded an opportunity for making out his case against the defendant, contractor, and the bonding company as surety, and having failed to prove his claim, though represented by counsel who was in court on the inception of the trial, he has now no standing to insist on placing a case upon the trial list that has been tried.

17. *Order of Court.*

April 10, 1919.—The rule to strike off is made absolute.

18. *Petition for Appeal.*

In the District Court of the United States for the Middle District of Pennsylvania. February Term, 1914.

No. 600.

UNITED STATES OF AMERICA to the Use of C. E. MILLER, Intervening Plaintiff,

vs.

AMERICAN BONDING COMPANY.

C. E. Miller, intervening plaintiff above named, hereby appeals to the United States Circuit Court of Appeals for the Third Circuit from the judgment of the court in the above-entitled case striking the case of the said C. E. Miller from the trial list, and prays that a writ of error may issue for the reasons set forth in the assignment of

40 errors filed herewith; that a transcript of the record, duly authenticated, may be sent to the said Circuit Court of Appeals; and that a citation be issued as provided by law.

May 26, 1919.

JAMES G. GLESSNER,
R. W. ARCHBALD,
Attorneys for C. E. Miller.

19. *Assignments of Error.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

THE UNITED STATES OF AMERICA to the Use of C. E. MILLER, Intervening Plaintiff,

vs.

AMERICAN BONDING COMPANY.

C. E. Miller, intervening plaintiff above named, as ground for the reversal of the judgment of the court making absolute the rule to show cause why the plaintiff's case should not be stricken from the trial list, hereby assigns the following errors:

1. The court erred in making absolute the rule to show cause why the plaintiff's case should not be stricken from the trial list granted on petition of the American Bonding Company, defendant in error; the case of the said plaintiff in error being untried and at
41 issue, and the said plaintiff in error being thereby denied the right to a trial by jury, as guaranteed by the Constitution of the United States.

2. The court erred in striking off of the trial list the case of the plaintiff in error; the petition of the American Bonding Company, defendant in error therefor; the rule to show cause granted thereon; and the order of the court being as follows:

Petition.

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania:

The petition of the American Bonding Company, one of the defendants above named, respectfully shows:

1. That the above-entitled action was brought in the name of the United States at the instance of Cæsar Francini, under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905 (Ch. 778, 33 Stat. 811), upon a bond executed by the

defendant, Mark P. Wells, as principal, and the petitioner as surety, in connection with a contract between said Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells for material and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of
42 claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller, and on April 1, 1915, a verdict was rendered by the jury in favor of the said plaintiffs who made proof as aforesaid, and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said cause.

That judgments in favor of the said plaintiffs were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely, the Pennsylvania Marble & Granite Company, which was reversed and a new trial ordered in respect to the claim of the said Pennsylvania Marble & Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble & Granite Company took an appeal from the said United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made between the petitioner and the said Pennsyl-
43 vania Marble & Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all the judgments entered as aforesaid in favor of the said plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble and Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of said Pennsylvania Marble & Granite Company and secured a release of all liability from said Company.

That as a result of said payments and settlement, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble & Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plain-

tiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right of the said C. E. Miller to have such trial of his claim, and does now except to such separate trial, upon the following grounds:

(*a*) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must
44 present proof of their claims, or be forever after barred from recovery.

(*b*) That a separate trial of the cause of the said C. E. Miller at this late date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of establishing the defense of the claim of the said C. E. Miller set out in the affidavit of defense heretofore filed by petitioner to said claim.

(*c*) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the whole cause at the discretion of this court, and as he failed to obtain such continuance and did not present his claim as hereinbefore averred at the said trial, he has lost all right to require the petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establish his claim made herein.

Wherefore, your petitioner prays that an order be made striking the said case of C. E. Miller from the trial list of this court.

And your petitioner will ever pray, etc.

(Signed) F. B. BRACKEN,
(Signed) CHAS. H. WELLES,
Attorneys for Petitioner.

STATE OF MARYLAND,
County of Baltimore, ss:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing peti-
45 tion are true and correct to the best of his knowledge, information and belief.

(Signed) GEORGE L. RADCLIFFE.

Sworn and subscribed to before me this 9th day of January, A. D. 1919.

(Signed) KATHARINE C. McGRATH. [SEAL.]
Notary Public.

My commission expires May 3, 1920.

Rule to Show Cause.

Now, January 13, 1919, rule is granted on plaintiff to show cause why the case on the trial list should not be continued and to show cause why the case shall not be stricken off the list. Returnable to next argument list January 30, 1919, 2 p. m.

(Signed) CHARLES B. WITMER,
District Judge.

Order of Court.

April 10, 1919.

The rule to strike off is made absolute.

CHARLES B. WITMER.
District Judge.

3. The court erred in striking off of the trial list the case of the plaintiff in error; the petition therefor; the rule to show cause granted thereon; the answer of the plaintiff in error thereto; and the order of the court thereon being as follows:

46 *Petition.*

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania:

The petition of the American Bonding Company, one of the defendants above named, respectfully shows:

1. That the above entitled action was brought in the name of the United States at the instance of Cæsar Francini, under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905 (Ch. 778, 33 Stat. 811), upon a bond executed by the defendant, Mark P. Wells, as principal, and the petitioner as surety, in connection with a contract between said Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells far materials and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller, and on April 1, 1915, a verdict was rendered by the jury in favor of the said
47 plaintiffs, who made proof as aforesaid, and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said cause.

That judgments in favor of the said plaintiffs were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely, the Pennsylvania Marble & Granite Company, which was reversed and a new trial ordered in respect to the claim of the said Pennsylvania Marble & Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble & Granite Company took an appeal from the said United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made between the petitioner and the said Pennsylvania Marble & Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all the judgments entered as aforesaid in favor of the said plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble & Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of said Pennsylvania
48 Marble & Granite Company and secured a release of all liability from said company.

That as a result of said payments and settlement, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble & Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plaintiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right of the said C. E. Miller to have such separate trial of his claim, and does now except to such separate trial, upon the following grounds:

(*a*) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery.

(*b*) That a separate trial of the case of the said C. E. Miller at this late date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of establishing the defense of the claim of the said C. E.
49 Miller set out in the affidavit of defense heretofore filed by petitioner to said claim.

(*c*) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the whole case at the discretion of this court, and as he failed to obtain such continuance and did not present his claim as hereinabove averred at the said trial, he has lost all right to require the petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establish his claim made herein.

Wherefore, your petitioner prays that an order be made striking the said case of C. E. Miller from the trial list of this court.

And your petitioner will ever pray, etc.

(Signed) F. B. BRACKEN.
(Signed) CHAS. H. WELLES,
Attorneys for Petitioner.

STATE OF MARYLAND,
County of Baltimore, ss:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing petition are true and correct to the best of his knowledge, information and belief.

(Signed) GEORGE L. RADCLIFFE.

Sworn to and subscribed before me this 9th day of January, A. D. 1919.

(Signed) KATHARINE C. McGRATH, [SEAL.]
Notary Public.

My commission expires May 3, 1920.

50 *Rule to Show Cause.*

Now, January 13, 1919, rule is granted on plaintiff to show cause why the case on the trial list shall not be continued and to show cause why the case shall not be stricken off the list.

Returnable to next argument list January 30, 1919, 2 p. m.

(Signed) CHARLES B. WITMER,
District Judge.

Answer.

To the Honorable Charles B. Witmer, United States District Judge:

C. E. Miller, intervening plaintiff, makes answer to the petition and rule of the American Bonding Company, defendant, as follows:

1. There is nothing in the said petition which entitles the said defendant to the relief asked for or warrants a denial to the said plaintiff of the right to have his claim heard and disposed of by the court and a jury in the regular way.

2. On April 27, 1915, on exceptions of the said defendant to the right of the said plaintiff to have a separate trial, it was ordered by the court that the case should be left off the trial list until the Circuit Court of Appeals had decided upon the question raised at the trial of the claims of other intervening plaintiffs, thereby reserving to the respondent the right to a trial after a decision by the said Circuit Court of Appeals, which has now been made.

51 3. Upon the reversal of the judgment of this court by the Circuit Court of Appeals as to the claim of the Pennsylvania Marble & Granite Company, the case was sent back to this court for a new trial, at which trial the present claimant would be entitled to be heard, if he so desired; and the American Bonding Company, defendant, could not by any settlement of the claim of the Pennsylvania Marble & Granite Company prevent such a trial.

4. The judgment entered on the several verdicts recovered in this case should have been for the penal sum named in the bond, to be released upon the payment of the various claims in suit; and had such judgment been entered, the present claimant would in any event have had opportunity to come in and make good his claim.

5. There is nothing in the statutes under which these proceedings are had which required the present claimant to submit proof of his claim along with the other intervening plaintiffs at the trial heretofore had.

The said petition and rule should therefore be dismissed.

(Signed) JAMES G. GLESSNER,
R. W. ARCHBALD,
Attorneys for C. E. Miller, Intervening Plaintiff.

Order of Court.

April 10, 1919.

The rule to strike off is made absolute.

CHARLES B. WITMER,
District Judge.

Filed May 26, 1919.

52 20. *Citation.*

In the District Court of the United States for the Middle District of Pennsylvania, February Term, 1914.

No. 600.

UNITED STATES OF AMERICA, to the Use of C. E. MILLER, Intervening Plaintiff,

vs.

AMERICAN BONDING COMPANY.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

President of the United States to American Bonding Company Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Third Circuit, to be holden at the City of Philadelphia within thirty (30) days, pursuant to the writ of error filed in the Clerk's Office of the District Court of the United States for the Middle District of Pennsylvania, wherein C. E. Miller is plaintiff in error and the American Bonding Company is defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said writ of error mentioned should not be corrected, and why speedy justice should not be done to the parties in that behalf.

53 Witness, Honorable Edward Douglass White, Chief Justice of the United States, this 26th day of May, A. D. 1919.

[SEAL.] G. C. SCHEUER,
Clerk.

Allowed by

CHARLES B. WITMER,
District Judge.

Service accepted May —, 1919.

CHARLES H. WELLES,
Attorney for Defendant in Error.

21. *Bond on Appeal.*

In the District Court of the United States for the Middle District of Pennslyvania, February Term, 1914.

No. 600.

THE UNITED STATES to the Use of C. E. MILLER, Intervening Plaintiff,

vs.

AMERICAN BONDING COMPANY.

Bond.

Know all men by these presents,

That we, C. E. Miller, of York, Pennsylvania, and John S. Flory and William Trimmer, of the same place, are held and firmly bound unto the American Bonding Company, its certain attorneys, successors or assigns, in the sum of Two Hundred and Fifty ($250.00) Dollars, to which payment well and truly to be made, we bind
54 ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this twenty-sixth day of May, A. D. 1919.

Whereas, lately at a District Court of the United States for the Middle District of Pennsylvania, in the suit pending in the said court, wherein the said C. E. Miller was plaintiff and the said the American Bonding Company was defendant, a judgment was rendered against the said C. E. Miller and the said C. E. Miller having obtained a writ of error and a citation having been directed to the said the American Bonding Company, citing and admonishing it to be and appear at a session of the United States Circuit Court of Appeals for the Third Circuit, to be holden in the City of Philadelphia on the — day of June next.

Now, the condition of this obligation is such, that if the said C. E. Miller shall prosecute said writ of error to effect and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

(Signed) C. E. MILLER. [SEAL.]
(Signed) JOHN S. FLORY. [SEAL.]
(Signed) WM. TRIMMER. [SEAL.]

Approved by

CHARLES B. WITMER,
District Judge.

55 22. *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Middle District of Pennsylvania, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between United States of America to the use of C. E. Miller, intervening plaintiff, and against American Bonding Company, a manifest error hath happened, to the great damage of the said C. E. Miller, intervening plaintiff, as by his complaint appears. We being willing that error if any hath been made, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Third Circuit, together with this writ, so that you have the same at the City of Philadelphia within thirty days, in the said United States Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that
56 error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward Douglass White, Chief Justice of the Supreme Court of the United States, at Philadelphia, the ninth day of June in the year of our Lord one thousand nine hundred and nineteen.

(Signed) GEORGE C. SCHEUER,
Clerk of the District Court of the United States.

Allowed by
CHARLES B. WITMER,
District Judge.

56½ In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1919.

No. 2481.

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY, Defendant in Error.

And afterwards, to wit on the tenth day of October, 1919, come the parties aforesaid by their counsel aforesaid, and this case being called for argument sur pleadings and briefs, before the Hon. Joseph

Buffington and the Hon. Victor B. Woolley, Circuit Judges, and the Hon. Hugh H. Morris, District Judge, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the sixth day of January, 1920, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

57 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1919.

No. 2481.

C. E. MILLER, Plaintiff-in-Error,

vs.

AMERICAN BONDING COMPANY, Defendant-in-Error.

In Error to the District Court of the United States for the Middle District of Pennsylvania.

Before Buffington and Woolley, Circuit Judges, and Morris, District Judge.

WOOLLEY, *Circuit Judge:*

An action was brought under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended by the Act of February 24, 1905, c. 778, 33 Stat. 811, 7 Comp. Stat. Section 6923, on a bond given the United States by Mark P. Wells, contractor for the construction of certain public works, and American Bonding Company (defendant-in-error), his surety. The plaintiff was the United States for the use of Cæsar Francini. C. E. Miller (plaintiff-in-error) was one of several intervening claimants.

58 At the trial, the use plaintiff and all intervening claimants, except Miller, appeared and successfully prosecuted their claims to verdict. After verdict, and while a motion for a new trial was pending, Miller ordered the case on the trial list for the trial of his claim. The trial judge struck it off pending review by this court on writ-of-error, upon the theory, doubtless, that, if the judgment were reversed, he might allow Miller to litigate his claim with the others in the retrial of the case. In due course, the motion for a new trial was refused, judgment entered, and a writ-of-error issued. On hearing by this court, the judgment was affirmed as to all claims except one, and was reversed as to that one on an error of the court in refusing binding instructions for the defendant. American Bonding Co. vs. United States, 233 Fed. 364. As to that one claim the court entered a formal order for a new trial. Slocum vs. New York Life Insurance Co., 228 U. S. 364. Thereafter, the claim was compromised by the parties and the action ended.

More than two years after review by this court, and long after the judgment had been satisfied, Miller again ordered the case on the trial list. On the defendant's motion to strike it off, Miller took the position that there is nothing in the statute under which the case was brought which required him to prosecute his claim with the other intervening claimants in one trial, and that, in consequence, he was entitled to have his claim adjudicated singly and at a separate trial before a jury of his own selection. The court, thinking otherwise, struck the case from the list. This is the matter brought here for review on this writ-of-error.

The Act of August 13, 1894 provided that persons furnishing materials and labor for the construction of public works, shall, after complying with certain formalities, be authorized to bring suit in the name of the United States for their use against the contractor and his sureties. This statute gave each of such persons a separate and independent right of action on the bond, permitting as many suits
59 against the surety as there were claimants, and as many trials as there were suits. This involved manifold inequities. It left claims of the United States on a parity with the claims of others, it permitted inequalities of recovery between claimants of the same class when the bond proved inadequate; it afforded no opportunity for contest by one claimant against the claim of another in preserving the security from diminution; it subjected sureties to multiplicity of suits and made possible divergent rulings by different courts on the same issues, resulting in prejudice and confusion. To overcome these and perhaps other disadvantages arising out of this statute Congress, by the amendatory Act of February 24, 1905, did two things: first, it assured to the United States priority in its claims, Illinois Surety Co. vs. Peeler, 240 U. S. 214, 218; and, second (while preserving the original right of action to materialmen and laborers), it provided,

"That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery."

It is clear from this amendment that Congress did not change the liability of sureties or withdraw from claimants their remedy on bonds for the construction of public works, previously provided by the Act of 1894; but changed simply the manner, and also the time in which their remedy against sureties should be asserted. To overcome the inequalities and infirmities of the original statute, Congress intended, after the claims of the United States had been satisfied, to unite all claimants in a single proceeding. A. Bryant Co. vs. N. Y. Steam Fitting Co., 235 U. S., 327, 337, to the end that, all matters in controversy between all claimants and the surety, as well as between the claimants themselves, arising out of the obligations of the bond should be litigated in one action, resulting in one recovery, in which

on the bond proving inadequate, distribution should be pro rata of the amount recovered.

60 This was, without doubt, the general intent of Congress. Whether there is any exception to it, we are not called upon to decide, because, in this case, none was claimed. If Miller was entitled to a separate trial by a jury of his own selection, or if he had a right to decline to submit his claim for trial with his co-intervenors, it could only have been because of some matter or circumstance addressed to the judgment or discretion of the trial judge, taking him out of the general provisions of the statute and placing him within some exception of the statute. No such matter or circumstance was claimed by Miller. He did not even move for a continuance of the case. As shown in the opinion of the learned trial judge, what Miller did was this;—being represented by counsel in court "when the case was called for trial, after issue joined and the usual publication of the list, (he) refused and neglected to submit his claim to adjudication without apparent reason or excuse."

Miller's action against this surety is not based on any right of action involving a common law right of trial by jury. It is based solely on the new right of action created by the statute "upon the terms named." The Texas Cement Co. vs. McCord, 233 U. S. 157; Illinois Surety Co. vs. Peeler, 240 U. S. 214, 217. These terms provide for one action for all claimants, after the United States has been satisfied, and one recovery for all, under which distribution is made on the claims proved according as the security is adequate or inadequate. In this scheme of the statute, the necessary implication is, that there shall be one trial of the "one action." By refusing to submit his claim to trial in the manner and at the time afforded by the statute, without offering to the trial judge any reason or excuse which might have removed him beyond its general terms—as to the possibility of which we express no opinion—Miller waived the right of action which the statute gave him. As the right of action which Miller thus discarded could in no way have been revived and restored to him in the subsequent proceedings, it is not necessary to review those proceedings in search for irregularities involving error.

The order of the court below must, therefore, be affirmed.

61 Endorsements: 2481. Opinion of the Court, by Woolley, J. Received & filed Jan. 6, 1920. Saunders Lewis, Jr., clerk.

62 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1919.

No. 2481 (List No. 14).

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY, Defendant in Error.

In Error to the District Court of the United States for the Middle District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Middle District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby affirmed, with costs.

Philadelphia, January 6, 1920.

JOS. BUFFINGTON.
Circuit Judge.

Endorsements: 2481. Order affirming judgment received & filed Jan. 6, 1920. Saunders Lewis, Jr., clerk.

63 In the United States Circuit Court of Appeals for the Third Circuit.

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY, Defendant in Error.

Assignments of Error.

UNITED STATES OF AMERICA, *ss:*

C. E. Miller, plaintiff in error above-named, as ground for the reversal of the judgment of the United States Circuit Court of Appeals for The Third Circuit, to review which judgment, the writ of error in this case is taken, hereby assigns the following errors:

1. The said The United States Circuit Court of Appeals erred in affirming the judgment of The United States District Court for the Middle District of Pennsylvania, making absolute the rule to show cause why the case of the plaintiff in error should not be stricken from the trial list of the said District Court, granted on petition of The American Bonding Company, defendant in error, and striking

the said case from the said trial list, the said case being then and there at issue and untried and no just cause being shown for the action of the said District Court.

2. The said The United States Circuit Court of Appeals erred in affirming the judgment of The United States District Court for the Middle District of Pennsylvania, making absolute the rule to show cause why the case of the plaintiff in error should not be stricken from the trial list of the said District Court, granted on petition of the American Bonding Company, defendant in error, and in striking the said case from the said trial list, the said case being then and there at issue and untried, and the plaintiff in error being thereby denied the right to a trial by jury as guaranteed by the Constitution of The United States.

3. The said The United States Circuit Court of Appeals erred in affirming the judgment of the said The District Court of The United States for The Middle District of Pennsylvania, making absolute the rule to show cause why the case of the plaintiff in error should not be stricken from the trial list of the said District Court, granted on the petition of The American Bonding Company, defendant in error, and in striking the said case from the said trial list, the petition of the defendant in error; the answer of the plaintiff in error thereto; the order of The District Court thereon; and the judgment of The United States District Court of Appeals, being as follows:

64

Petition.

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania:

The petition of the American Bonding Company, one of the defendants above-named, respectfully shows:

1. That the above-entitled action was brought in the name of the United States at the instance of Cæsar Francini under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905, (Ch. 778, 33 Stat. 811), upon the bond executed by the defendant, Mark P. Wells, as principal, and the petitioner as surety, in connection with a contract between said Mark P. Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells for material and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

65

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller,

and on April 1, 1915, a verdict was rendered by the jury in favor of the said plaintiffs who made proof as aforesaid, and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said cause.

That judgments in favor of the said plaintiff were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely, the Pennsylvania Marble and Granite Company, which was reversed and a new trial ordered in respect to the claim of the said Pennsylvania Marble and Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble and Granite Company took an appeal from the said United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made between the petitioner and the said Pennsylvania Marble and Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all the judgments entered as aforesaid in favor of the said plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble and Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of said Pennsylvania Marble and Granite Company and secured a release of all liability from said company.

That as a result of said payments and settlement, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble and Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plaintiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right of the said C. E. Miller to have such trial of his claim, and does now except to such separate trial, upon the following grounds:

66 (*a*) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery.

(*b*) That a separate trial of the case of the said C. E. Miller at this late date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of establishing the defense of the claim of the said C. E. Miller set out in the affidavit of defense heretofore filed by petitioner to said claim.

(*c*) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the whole case at the discretion of this court, and as he failed to obtain such continuance and did not present his claim as hereinbefore averred at the said trial, he has lost all right to require the petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establish his claim made herein.

Wherefore, your petitioner prays that an order be made striking the said case of C. E. Miller from the trial list of this court.

And your petitioner will ever pray, etc.

F. B. BRACKEN,
CHAS. H. WELLES,
Attorneys for Petitioner.

STATE OF MARYLAND,
County of Baltimore, ss:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing petition are true and correct to the best of his knowledge, information and belief.

(Signed) GEORGE L. RADCLIFFE.

Sworn to and subscribed before me this 9th day of January, A. D. 1919.

KATHARINE C. McGRATH, [SEAL.]
Notary Public.

My commission expires May 3, 1920.

(*b*) *Rule to Show Cause.*

Now, January 13, 1919, rule is granted on plaintiff to show cause why the case on the trial list shall not be continued and to show cause why the case shall not be stricken off the list.

Returnable to next argument list January 30, 1919, 2 p. m.

CHARLES B. WITMER,
District Judge.

67 *Answer.*

To the Honorable Charles B. Witmer, United States District Judge:

C. E. Miller, intervening plaintiff, makes answer to the petition and rule of the American Bonding Company, defendant, as follows:

1. There is nothing in the said petition which entitles the said defendant to the relief asked for or warrants a denial to the said plaintiff of the right to have his claim heard and disposed of by the court and a jury in the regular way.

2. On April 27, 1915, on exceptions of the said defendant to the right of the said plaintiff to have a separate trial, it was ordered by the court that the case should be left off the trial list until the Circuit Court of Appeals had decided upon the question raised at the trial of the claims of other intervening plaintiffs, thereby reserving to the respondent the right to a trial after a decision by the said Circuit Court of Appeals, which has now been made.

3. Upon the reversal of the judgment of this court by the Circuit Court of Appeals as to the claim of the Pennsylvania Marble and Granite Company, the case was sent back to this court for a new trial, at which trial the present claimant would be entitled to be heard, if he so desired; and the American Bonding Company, defendant, could not by any settlement of the claim of the Pennsylvania Marble and Granite Company prevent such a trial.

4. The judgment entered on the several verdicts recovered in this case should have been for the penal sum named in the bond, to be released upon the payment of the various claims in suit; and had such judgment been entered, the present claimant would in any event have had opportunity to come in and make good his claim.

5. There is nothing in the statutes under which these proceedings are had which required the present claimant to submit proof of his claim along with the other intervening plaintiffs at the trial heretofore had.

The said petition and rule should therefore be dismissed.

JAMES G. GLESSNER,
R. W. ARCHBALD,
Attorneys for C. E. Miller, Intervening Plaintiff.

Order of Court.

April 10, 1919.

The rule to strike off is made absolute.

CHARLES B. WITMER,
District Judge.

68 *Judgment of Circuit Court of Appeals.*

It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this case be and the same is hereby affirmed, with costs, and that the said American Bonding Company, defendant in error, recover against the said C. E. Miller, plaintiff in error, the sum of $20.00 for their costs herein expended, and have execution thereof.

Wherefore, the plaintiff in error prays that the judgment of The United States Circuit Court of Appeals for the Third Circuit be reversed; and that the case of the said plaintiff in error may be restored to the trial list of the said The District Court, to be there tried in due course.

JAS. G. GLESSNER,
Attorney for Plaintiff in Error.

Endorsements: 2481. Assignments of error received & filed Apr. 28, 1920. Saunders Lewis, Jr., clerk.

69 **In the United States Circuit Court of Appeals for the Third Circuit.**

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY, Defendant in Error.

To the Honorable the Judges of the said Court:

C. E. Miller, plaintiff in error above-named, hereby appeals to The Supreme Court of The United States from the judgment of The United States Circuit Court of Appeals for the Third Circuit affirming the judgment of The District Court of The United States for the Middle District of Pennsylvania, striking the case of the said C. E. Miller from the trial list of the said District Court; and prays that a writ of error may issue to The United States Supreme Court to reverse the judgment of the said Circuit Court of Appeals, for the reason set forth in the assignments of error herewith filed; that a transcript of the record, duly authenticated, may be sent to the said United States Supreme Court, and that a citation may issue as provided by law.

JAS. G. GLESSNER,
Attorney for C. E. Miller, Plaintiff in Error.

April 6, 1920.

And now, April 28, 1920, appeal allowed as prayed for and bond approved.

JOS. BUFFINGTON, *C. J.*

Endorsements: 2481. Petition and appeal received & filed Apr. 28, 1920. Saunders Lewis, Jr., clerk.

70 In the United States Circuit Court of Appeals for the Third District, October Term, 1919.

No. 2481.

THE UNITED STATES to the Use of C. E. MILLER, Intervening Plaintiff,

vs.

AMERICAN BONDING CO

Bond.

Know all men by these presents, that we, C. E. Miller of York, Pennsylvania, William Trimmer of York, Pennsylvania, and M. M. Miller of Windsor Township, York County, Pennsylvania, are held and firmly bound unto the American Bonding Company, its certain attorneys, successors or assigns, in the sum of two hundred and fifty ($250.00) dollars, to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this 28th day of April, A. D. 1920.

Whereas, lately in the United States Circuit Court of Appeals, for the Middle District of Pennsylvania, in the suit pending in said Court, wherein the said C. E. Miller was plaintiff and the said American Bonding Company was defendant, a judgment was rendered against the said C. E. Miller, and the said C. E. Miller having obtained a writ of error and a citation having been directed to the said American Bonding Company, citing and admonishing it to be and appear at a session of the Supreme Court of the United States to be holden in the City of Washington, on the — day of — next.

Now, the condition of this obligation is such, that if the said C. E. Miller, shall prosecute said appeal to effect,—and answer all damages and costs, if he fail to make the said plea good, then the above obligation to be void, else to remain in full force and virtue.

C. E. MILLER. [SEAL.]
M. M. MILLER. [SEAL.]
WM. TRIMMER. [SEAL.]

Witnesses:
A. E. KOONS.

Approved by
SAUNDERS LEWIS, JR.,
Clerk.

Endorsements: 2481. Bond of C. E. Miller received & filed Apr. 28, 1920.

71 UNITED STATES OF AMERICA, *ss:*

[SEAL.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between C. E. Miller and American Bonding Company, a manifest error hath happened, to the great damage of the said C. E. Miller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty (1920).

SAUNDERS LEWIS, JR.,
Clerk U. S. C. C. of A.

Allowed by:
JOS. BUFFINGTON,
Circuit Judge.

Endorsements: 2481. Writ of error.

72 UNITED STATES OF AMERICA,
Eastern District of Pennsylvania,
Third Judicial Circuit, set:

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original record and proceedings of this Court in the case of C. E. Miller, Plaintiff in Error, vs. American Bonding Company, Defendant in Error, on file and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this fifth day of May, in the year of our Lord one thousand nine hundred and twenty

and of the Independence of the United States the one hundred and forty-fourth.

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,
Clerk of the U. S. Circuit Court of Appeals, Third Circuit.

73 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

The President of the United States to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court of Appeals, before you, or some of you, between C. E. Miller and American Bonding Company, a manifest error hath happened, to the great damage of the said C. E. Miller, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-eighth day of April, in the year of our Lord one thousand nine hundred and twenty (1920).

SAUNDERS LEWIS, JR.,
Clerk U. S. C. C. of A.

Allowed by:

JOS. BUFFINGTON,
Circuit Judge.

74 [Endorsed:] 2481. Writ of error.

75 UNITED STATES OF AMERICA, *ss:*

[Seal of the United States Circuit Court of Appeals, Third Circuit.]

To the American Bonding Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the Clerk's office of the United States Circuit Court of Appeals for the Third Circuit, wherein C. E. Miller is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against the said Plaintiff in Error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Edward D. White, Chief Justice of the Supreme Court of the United States, this twenty-eigth day of April, in the year of our Lord one thousand nine hundred and twenty (1920).

JOS. BUFFINGTON,
Circuit Judge.

76 [Endorsed:] Citation.

I hereby accept service of the within citation on behalf of the American Bonding Company, defendant in error.
Dated, May 4th, 1920.

F. B. BRACKEN,
By W. H. MYERS, JR.,
Attorney for Defendant in Error.

Endorsed on cover: File No. 27,691. U. S. Circuit Court Appeals, 3d Circuit. Term No. 346. C. E. Miller, plaintiff in error, vs. American Bonding Company. Filed May 17th, 1920. File No. 27,691.

No. [redacted]59

In The Supreme Court of the United States

October Term, 1920.

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY,
Defendant in Error

In Error to the United States Circuit Court of Appeals for the Third District

---

BRIEF OF PLAINTIFF IN ERROR

JAMES G. GLESSNER,
21 S. George St., York, Pa.

R. W. ARCHBALD,
Scranton, Pa.

Attorneys for Plaintiff in Error.

Kyle Printing Co. York, Penna.

INDEX

STATUTES.

CASES.

IN THE

Supreme Court of the United States

October Term, 1920.

C. E. MILLER, Plaintiff in Error

vs.

AMERICAN BONDING COMPANY, Defendant in Error

No. 346

STATEMENT OR ABSTRACT.

1. The cause comes before this Court on an appeal allowed by the Circuit Court of Appeals for the Third District under Section 250 of the Judicial Code which provides that,

> "In any case in which the judgment or decree of the Circuit Court of Appeals is not made final by the provisions of the Title, there shall be of right an appeal or writ of error to the Supreme Court of the United States where the matter in controversy shall exceed one thousand dollars, besides costs."

The amount involved in this suit is tweve hundred and forty-eight dollars and forty ($1248.40) cents.

Re-instatement of suit, is the relief sought.

Action at law under Act February 24, 1905, by Caesar Francini on bond of Mark P. Wells as contractor for the construction of the United States Post Office at York, Pennsylvania; the American Bonding Company being surety on the bond; and C. E. Miller, who furnished material for the building, being an intervening plaintiff.

The case of the said C. E. Miller being at issue and

undisposed of, on petition of the American Bonding Company, was stricken from the trial list. And thereupon the said C. E. Miller brings error.

2. Abstract of Petition of the American Bonding Company to Strike Case From Trial List, and Answer of C. E. Miller, Intervening Plaintiff, thereto:

(a) Petition of the American Bonding Company (R 17);

1. This action was brought by Caesar Francini under the statute on Bond of Mark P. Wells as principal and petitioner as surety in connection with contract for erection of post office at York, Pa., in which action other creditors, including C. E. Miller, intervened and filed statements of claim.

2. On March 29, 1915, the case was tried to a jury, and at the said trial all the intervening plaintiffs made proof of their claims, excepting the said C. E. Miller; and on April 1, a verdict was rendered in their favor in varying amounts, on which judgments were subsequently entered.

3. The defendants appealed to The United States Circuit Court of Appeals, and on July 22, 1916, the judgments were affirmed, excepting the one in favor of the Pennsylvania Marble and Granite Company, which was reversed, and a new trial ordered. The Pennsylvania Marble and Granite Company took an appeal to the United States Supreme Court, and as the result of a settlement with the petitioner, the appeal was discontinued.

4. The petitioner has paid the judgments entered in favor of the other plaintiffs and made settlement and secured a release of liability from The Pennsylvania Marble and Granite Company, and has caused the same to be marked settled and discontinued.

5. Notwithstanding the aforesaid trial and the termination of the proceedings on the claims of those who

participated therein, the said C. E. Miller has ordered his case on the next trial list, with the purpose of having a separate trial thereon; to which the petitioner excepts on the following grounds:

(a) The Act of Congress contemplates and provides for only one action and one trial, at which all intervening plaintiffs must prove their claims or be forever barred;

(b) A separate trial of the case of said C. E. Miller would impose a great burden and a large additional expense on petitioner, in order to establish the defense set up in the affidavit of defense of the petitioner thereto.

(c) If the said C. E. Miller was not in a position to prove his claim at the time of the trial, his only remedy was to get a continuance of the whole case, and not having obtained the said continuance nor presented his claim, he has lost the right to require the petitioner to defend against it.

(b) Answer of C. E. Miller, (R-20):

1. There is nothing in the petition which entitles the defendant to the relief asked for, or warrants a denial to the plaintiff of the right to have his claim heard and disposed of by the Court and a jury in the regular way.

2. On April 27, 1915, on exception of the petitioner it was ordered by the Court that the case should be left off the trial list until The Circuit Court of Appeals had decided the questions raised at the trial of the other intervening claims; thereby reserving to respondent the right to a trial now that such decision has been made.

3. Upon the reversal of the judgment as to the claim of The Pennsylvania Marble and Granite Company, the case was sent back for a new trial, at which trial the present claimant was entitled to be heard, if he so desired; and the petitioner could not prevent this by a settlement with The Pennsylvania Marble and Granite Company.

4. The judgment entered on the several verdicts rendered should have been for the penal sum in the bond, to be released upon payment of the various claims in suit; and had this been done, the present claimant in any event would have had oppurtunity to come in and make good his claim.

5. There is nothing in the statute under which these proceedings are brought which required the present claimant to submit proof of his claim along with the other intervening plaintiffs at the trial heretofore had.

3. Questions Involved

1. In an action on the bond of a government contractor, are all intervening creditors required to try out their claims before the same jury, or be barred from coming in on the bond?

2. Whether in such action each intervening plaintiff is entitled to a separate trial before a jury of his own selection or whether all claims must be heard and disposed of by the same jury?

4. History of the Case.

This is a suit on the bond of Mark P. Wells, who built the post office building at York, Pennsylvania, under contract with the Government. As required by the statute, he gave bond as contractor in the sum of $120,000, on which the American Bonding Company, defendant in error, became surety. A copy of the bond appears in the record, page 6. The building was begun in October, 1910, and completed sometime in the early part of 1913; and C. E. Miller, plaintiff in error, furnished brick which went into its conctruction. On Aug 2, 1913, a final settlement was made by the contractor with the Government; and on Feb. 4, 1914, one Caesar Francini, who had also furnished materials, brought suit on the bond in the present action. A number of other creditors thereupon applied and were allowed to intervene and among them C. E. Miller, the plaintiff in error, who made claim for a balance due of $1,248.30, with interest.

On March 29, 1915, a jury was called at Scranton and a trial had, in which the original plaintiff and all intervening creditors, excepting the plaintiff in error, participated. The jury gave a verdict in favor of the several plaintiffs as follows: Caesar Francini, $975.87; Pisani Brothers, $1,575; Voska, Foelsch & Sidlo, $12,550; Atchison Revolving Door Company, $1,022; Pennsylvania Marble and Granite Company, $26,200. A new trial was applied for but was refused, and judgments were thereupon entered on the verdicts in favor of the different parties named for the respective amounts found by the jury. The American Bonding Company then took a writ of error to this Court, where the judgments were affirmed July 22, 1916, except the one in favor of The Pennsylvania Marble and Granite Company, which was reversed (233 Fed. 364) and sent back to The District Court for a new trial. (See mandate, record, p. 229.)

Prior to this, however, in April, 1915, while the rule for a new trial taken by the defendant was still pending, the plaintiff in error ordered his case on the trial list for the May Term at Harrisburg. The American Bonding Company took exception to this (Record, p. 14), and the Court thereupon made an order (p. 15) that the case be left off the list until this Court, where it was anticipated the case would go, had disposed of the questions raised at the trial, the principal question being whether the suit had not been brought prematurely. This question having been decided adversely to the defendant, the plaintiff in error, in November, 1918, again filed a praecipe to have his case put on the list for trial at the December Term at Harrisburg; and The American Bonding Company thereupon filed a second petition (record, p. 17), and obtained a rule to strike the case from the list for substantially the reasons previously given. The plaintiff in error made answer to this rule (record, p. 20), but the court, after argument, made the rule absolute (p. 21). And the case was stricken from the list. An appeal from this order brought the case before the Court of appeals for the Third District

which on Jan. 6th, 1920, affirmed the Judgment of the Said District Court. Appeal to this Court was allowed on April 28th, 1920.

5. Assigned error upon which plaintiff relies.

The assignments (R. 36 & 37) specify three errors as follows:

First Assignment

1. The court erred in making absolute the rule to show cause why the plaintiff's case should not be stricken from the trial list granted on petition of the American Bonding Company, defendant in error; the case of the said plaintiff in error being untried and at issue, and the said plaintiff in error being thereby denied the right to a trial by jury, as guaranteed by the Constitution of the United States.

Second Assignment

2. The court erred in striking off of the trial list the case of the plaintiff in error; the petition of the American Bonding Company, defendant in error therefor; the rule to show cause granted thereon; and the order of the court being as follows:

(a) Petition. (R 17)

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania:

The petition of the American Bonding Company, one of the defendants above-named, respectfully shows:

1. That the above-entitled action was brought in the name of the United States at the instance of Caesar Francini, under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905, (Ch. 778, 33 Stat. 811), upon the bond executed by the defendant, Mark P. Wells, as principal, and the petitioner as surety, in connection with a contract be-

tween said Mark P. Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells for material and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller, and on April 1, 1915, verdict was rendered by the jury in favor of the said plaintiffs who made proof as aforesaid, and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said case.

That judgments in favor of the said plaintiff were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely, the Pennsylvania Marble and Granite Company, which was reversed and a new trial ordered in respect to the claim of the said Pennsylvania Marble and Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble and Granite Company took an appeal from the said United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made

between the petitioner and the said Pennsylvania Marble and Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all the judgments entered as aforesaid in favor of the said plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble and Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of said Pennsylvania Marble and Granite Company and secured a release of all liability from said Company.

That as a result of said payments and settlement, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble and Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plaintiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right of the said C. E. Miller to have such separate trial of his claim, and does now except to such separate trial, upon the following grounds:

(a) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery.

(b) That a separate trial of the cause of the said C. E. Miller at this late date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of estab-

lishing the defense of the claim of the said C. E. Miller set out in the affidavit of defense heretofore filed by petitiomer to said claim.

(c) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said traiil, his only remedy was to seek a continuance of the whole cause at the discretion of this court, and as he failled to obtain such continuance and did not present his claiim as hereinbefore averred at the said trial, he has lost all right to require petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establisih his claim made herein.

Wherefore, your petitioner prays that an order be made striking the said case of C. E. Miller from the trial list of this court.

And your petitioner will ever pray, etc.

Chas. H. Welles,
F. B. Bracken,
Attorneys for Petitioner.

Sttate of Maryland, County of Baltimore, ss:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing petition are true and correct to the best of his knowledge, information and beliief.

George L. Radcliffe.

Sworn to and subscribed to before me this 9th day of January, A. D. 1919.

Katherine C. McGrath, (Seal)
Notary Public.

My Commission expires May 3, 1920.

((b)—Rule to Show Cause.—(R 20)

Now, January 13, 1919, rule is granted on plaintiff

to show cause why the case on the trial list should not be continued and to show cause why the case shall not be stricken off the list. Returnable to next argument list January 30, 1919, 2 p. m.

Charles B. Witmer,
District Judge.

(c) Order of Court (R 22) April 10, 1919.

The rule to strike off is made absolute.

Charles B. Witmer,
District Judge.

Third Assignment.

3. The court erred in striking off of the trial list the case of the plaintiff in error; the petition therefor; the rule to show cause granted thereon; the answer of the plaintiff in error therto; and the order of the court thereon being as follows:

(a) Petition. (R 17)

To the Honorable Charles B. Witmer, President Judge of the United States District Court for the Middle District of Pennsylvania.

The petition of the American Bonding Company, one of the defendants above-named, respectfully shows:

1. That the above-entitled action was brought in the name of the United States at the instance of Caesar Francini, under the provisions of the Act of Congress of August 13, 1894, as amended by the Act of April 24, 1905 (Ch. 778, 33 Stat. 811), upon a bond executed by the defendant, Mark P. Wells, as principal, and the petitioner as surety, in connection with a contract between said Wells and the United States for the erection of a post office building at York, Pennsylvania, conditioned for the completion of the same and payment by the said Wells for materials and labor supplied toward the erection of said building.

That other creditors, claiming to be creditors of Wells, including C. E. Miller, intervened in said action and filed statements of claim therein, to which affidavits of defense were filed by the petitioner, as one of the defendants therein.

2. That on March 29, 1915, the said case was tried to a jury, and at said trial all of the said intervening plaintiffs made proof of their respective claims, excepting the said C. E. Miller, and on April 1, 1915, a verdict was rendered by the jury in favor of the said plaintiffs, who made proof as aforesaid and against the defendants to the use of the said plaintiffs, excepting the said Miller, in certain amounts, as will more fully appear from the docket entries in the said cause.

That judgments in favor of the said plaintiffs were subsequently entered on the said verdict on December 16, 1915.

3. That the defendants appealed from the said judgments to the United States Circuit Court of Appeals, and thereafter, to wit, on the 22nd day of July, 1916, the said Circuit Court of Appeals duly affirmed all of the said judgments, excepting the judgment entered in favor of one of the said plaintiffs, namely the Pennsylvania Marble and Granite Company, which was reversed and a new trial ordered in respect to the claim of the said Pennsylvania Marble and Granite Company, the said Court of Appeals holding that this court should have given binding instructions in favor of the defendant in respect to the said claim.

That the said Pennsylvania Marble and Granite Company took an appeal from the United States Circuit Court of Appeals to the United States Supreme Court, but the said appeal, as the result of a settlement made between the petitioner and the said Pennsylvania Marble and Granite Company, was subsequently discontinued.

4. That your petitioner has paid the amounts of all judgments entered as aforesaid in favor of the said

plaintiffs, excepting the judgment entered in favor of the said Pennsylvania Marble and Granite Company, and pending its said appeal to the United States Supreme Court made settlement of the claim of the said Pennsylvania Marble and Granite Company and secured a release of all liability from said company.

That as a result of said payments and settlement, the said plaintiffs have all caused the said judgments in their favor to be marked discontinued, settled and ended, and the said Pennsylvania Marble and Granite Company has likewise caused to be entered an order in the said suit evidencing the settlement of its said claim.

5. That the said C. E. Miller, notwithstanding the aforesaid trial and termination of the proceedings on the claims of all the plaintiffs who participated therein, has ordered his case to be placed upon the next ensuing trial list of this court with the object and purpose of having a separate trial of his said claim.

That your petitioner has heretofore excepted to the right of the said C. E. Miller to have such separate trial of his claim, and does now except to such separate trial, upon the following grounds:

(a) The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery.

(b) That a separate trial of the case of the said C. E. Miller at this date would impose a great burden upon your petitioner, as one of the defendants, in that large additional expense would be involved in procuring the attendance of witnesses, for the purpose of establishing the defense of the claim of the said C. E. Miller set out in the affidavit of defense heretofore filed by petitioner to said claim.

(c) That if said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the

whole cause at the discretion of this court, and as he failed to obtain such continuance and did not present his claim as hereinabove averred at the said trial, he has lost all right to require the petitioner to incur the expense of defending a second trial of the said action, for the purpose of enabling the plaintiff to undertake to establish his claim made herein.

Wherefore your petitioner prays that an order be made striking the said case of C. E. Miller from the trial list of this court.

And your petitioner will ever pray, etc.

F. B. Bracken,
Chas. H. Welles,
Attorneys for Petitioner.

State of Maryland, County of Baltimore, ss.:

George L. Radcliffe, being duly sworn, deposes and says that he is an officer of petitioner, American Bonding Company, being the President thereof, and that the facts averred in the foregoing petition, are true and correct to the best of his knowledge, information and belief.

George L. Radcliffe.

Sworn to and subscribed before me this 9th day of January, A. D. 1919.

Katharine C. McGrath, (Seal)
Notary Public.

My commission expires May 3, 1920.

(b) Rule to Show Cause. (R 20)

Now, January 13, 1919, rule is granted on plaintiff to show cause why the case on the trial list shall not be continued and to show cause why the case shall not be stricken off the list.

Returnable to next argument list January 30, 1919, 2 p. m.

Charles B. Witmer,
District Judge.

(c) Answer. (R 20)

To the Honorable Charles B. Witmer, United States District Judge:

C. E. Miller, intervening plaintiff, makes answer to the petition and rule of the American Bonding Company, defendant, as follows:

1. There is nothing in the said petition which entitles the said defendant to the relief asked for or warrants a denial to the said plaintiff of the right to have his claim heard and disposed of by the court and a jury in the regular way.

2. On April 27, 1915, on exceptions of the said defendant to the right of the said plaintiff to have a separate trial, it was ordered by the court that the case should be left off the trial list until the Circuit Court of Appeals had decided upon the question raised at the trial of the claims of other intervening plaintiffs, thereby reserving to the respondent the right to a trial after a decision by the said Circuit Court of Appeals, which has now been made.

3. Upon the reversal of the judgment of this court by the Circuit Court of Appeals as to the claim of the Pennsylvania Marble and Granite Company, the case was sent back to this court for a new trial, at which trial the present claimant would be entitled to be heard, if he so desired; and the American Bonding Company, defendant, could not by any settlement of the claim of the Pennsylvania Marble and Granite Company prevent such a trial.

4. The judgment entered on the several verdicts recovered in this case should have been for the penal sum named in the bond, to be released upon the payment of the various claims in suit; and had such judgment been entered, the present claimant would in any event have had opportunity to come in and make good his claim.

5. There is nothing in the statutes under which these proceedings are had which required the present

claimant to submit proof of his claim along with the other intervening plaintiffs at the trial heretofore had.

The said petition and rule should therefore be dismissed.

James G. Glessner,
R. W. Archbald,
Attorneys for C. E. Miller,
Intervening Plaintiff.

(d) **Order of Court.** April 10, 1919.

The rule to strike off is made absolute.

Charles B. Witmer,
District Judge.

6. Argument.

The case involves the construction of the Act of Congress of August 13, 1894, as amended by the Act of February 24, 1905, which gives a right to those who have furnished material for the construction of a government building or other government work, to resort for their pay to the bond of the contractor. The plaintiff in error comes within this category, and the question is whether, having intervened in the action brought on the bond by one creditor in conformity with the statute, he was compeled to try his case along with that of the original plaintiff and the other intervening claimants before one and the same jury; and whether, having failed so to do, he is debarred from coming in on the bond. The Court below, at the instance of the defendant in error, held that he was, and thereupon struck his case from the trial list. The plaintiff in error had regularly intervened, and his case was at issue and undisposed of, and being put out of court by the order made, there was nothing left for him to do but to bring a writ of error.

To sustain the action of the court below, it must be made to appear, either by the express terms of the statute or by necessary implication, in order to effectuate its purposes, that this is the construction to be put upon

it. And unless this is done, the action of the Court cannot be justified.

The statute will be searched in vain for any express provision requiring all claims against a contractor to be tried together; and the defendant is therefor compelled to resort to necessary implication. We confidently affirm that not only is there no such implication properly to be drawn, but that the construction contended for is forced and unnatural, and denies to all such claimants rights guaranteed by the fundamental law as well as by this statute, and that this will appear by the following considerations:

1. The claim of each intervening creditor is separate and distinct from the others, respresenting a distinct and independent cause of action and is therefor naturally, if not necessarily, to be separately tried and disposed of.

By the original Act (Act August 13, 1894, 28 Stat. 228; 7 Compiled Stat., Sec. 6923 note) each claimant who came within the terms of the bond had a separate and independent right of action on which suit could be brought wherever service could be made, permitting as many suits as there were claims; all of which, of course, were separately and independently tried. United States vs. Perth Amboy Company, 137 Fed., 689; United States vs. United States Fidelity Company, 63 Alt., 581.

The amended Act, which is the one which now prevails (Act 24 February, 1905, 33 Stat. 811, 7 Comp. Stat., Sec. 6923) changed this, but only to the extent of requiring that there should be one action, which must be brought in the District where the contract was performed, and that in this action, by whomsoever brought, other claimants should intervene and "have their rights and claims adjusted * * * and judgment rendered thereon." The several claims, however, were not to lose their identity; nor is there any consolidation of them. Action having been brought on the bond by one creditor, the others are simply required to come in and

prosecute their claims in the one proceeding. But there is not a word in the statute as to their being tried and considered jointly, and this is not to be assumed, unless there is some overweening necessity which compels it. It was at one time held by some of the lower courts that because of pro-rating the claims if they exceeded the bond, proceedings on the bond had to be by bill in equity. Illinois Surety Company vs. United States, 212 Fed., 136; 228 Fed., 304. And a bill of that kind was actually filed in the present case, although subsequently abandoned. But the Supreme Court decided otherwise. Illinois Surety Company vs. United States, 240 U. S., 214. And this effectually negatived the contention that all claims had to be passed upon at one and the same time, upon which that idea was predicated.

In support of the propostion that the claims are several and distinct, it is said in Title Guaranty Company vs. Crane, 219, U. S., 29: "The claims are several and represent distinct causes of action in different parties." And this is repeated in Illinois Surety Company vs. United States, 240 U. S., 214-225, just referred to, where it is said: "Any creditor who duly presents his claim in such an action becomes a party thereto, with a distinct cause of action." Nor is this affected by the fact that other claimants after the one by whom suit is brought are said to "intervene" in the action. Where the right to intervene, as here, exists, each party intervening has "the same rights in proving his case, in trying it, and in enforcing his judgment, as those who were originally plaintiffs and defendants." 11 Ency. Plead. & Prac., 509. "Were we doubtful on this point," says the Court in La Croix vs. Menad, 3 Martin N. S. (La.) 339, "the regard which we entertain for the trial by jury * * would induce us to support the citizen who claims it in the investigation of his rights."

Each claim, therefor, being independent of the others—representing a separate and distinct cause of action—and there being no consolidation of them by the statute or by order of court, what considerations are there which require that they shall all be tried and dis-

posed of at one and the same time, by the same jury, with the possible conflict of interest and confusion of evidence which is likely to result from such a proceeding?

It is said that, liability on the bond being limited by the penal sum, it is essential to a proper proceeding that all claims should be liquidated at the same time in order that it may be known whether they exceed the amount of the bond, and if they do, how it is to be apportioned.

The bond in this case is $120,000, and the claims of creditors who have intervened as they originally stood and have since been adjudicated, do not exceed the sum of $45,000, so that there is no question here but the bond is large enough to satisfy all claims against it. It might not be so, however, in other cases, and the bearing of this has therefore to be considered. Now it may be conceded that in the interest of expedition the trial court in this, as in other cases, might require a prompt disposition of the different claims; and that, under the statute, permitting the consolidation of causes of a like nature (Rev. Stat., Sec. 921, 3 Comp. Stat., Sec. 1547) the court below might have provided for the joint trial of all claims in his particular instance. But the fact is, that it did do so; and on the contrary, when the question which is now mooted was first raised, an order was simply made (record, p. 15) that the case should be left off the trial list until this court had decided the questions raised at the trial as to whether the suit was prematurely brought; and this in necessary effect reserved to the present plaintiff the right to a trial after a decision on this point had been made. And the right to a trial having been left open in this way, cannot, of course, be foreclosed upon what the court might have done but did not do, towards compelling a joint trial. **The question, therefor, still remains, whether, not only in this but in every such instance, in order that the statute may be properly enforced and the relief there provided for be duly administered, all parties ex necessitate must come in and submit their claims to the same jury. And**

it is submitted that there is no such constraining necessity.

It certainly cannot be said that the statute contemplates it either from the standpoint of the original or the intervening claimants; or, (if that were to be regarded as controlling, as it is not) from the standpoint of the defendant. The bond as written is the limit of the surety's liability, and it neither can nor will be lessened or increased, whether all the claims are tried together, or whether they are put into judgment separately. Nor has the defendant any other or different issue to meet in the one case than in the other. Each claim stands on its own bottom, and must be sustained or overcome by evidence special and peculiar to itself, according to the various issues raised with regard to it, as to which it is a detriment and not an advantage to the defendant as well as to the claimants to have the evidence applicable to different claims jumbled up together in a single trial. At is said in Philadelphia vs. Stewart, 198 Pa., 422-425, where separate actions by different sub-contractors on the same bond were sustained under the state law: "If all the issues which may be raised by all the sub-contractors, with the details of each of them, were to be tried and determined in a single suit before one jury, it would necessarily result in confusion and uncertainty."

It certainly is true, as a matter of common experience, that nothing is to be gained and not a little lost by such a procedure. One disadvantage almost inevitably to result in suggested by the defendant itself in the petition on which the plaintiff's case was stricken from the list. As is there siad (record, p. 19, paragraph c): "If the said C. E. Miller was not in a position to present proofs of his claim at the time of the said trial, his only remedy was to seek a continuance of the whole case, at the discretion of the court." In other words, in every instance where one of the parties plaintiff is not in a position to try his case when the case at large is called for trial, however meritorious may be the ground for asking for a continuance and however impossible it may

be to prove his case at that time, he must nevertheless go to trial, unless he can persuade the court, in the exercise of its discretion, to put the whole case over. Or, putting it in another way, notwithstanding that every other claimant may be ready and anxious to proceed and it may be a hardship for some of them not to do so, the whole trial, in order to meet the existing exigency as to some one claim, must be postponed; and this must go on from time to time, whenever the case is called, until all the parties are absolutely ready and consenting. A construction which brings about this result is certainly to be avoided, if possible. And there is nothing in the way of expedition in the common disposal, at one and the same time, of all the claims, to weight against it. The separate trial of each claim may possibly result in some delay, although not necessarily; but that is all that can be said against it. It is sufficiently so for all practical purposes, while at the same time it preserves the essential rights of each individual claimant, which cannot otherwise be done, a matter which is of controlling importance. The particular point to be observed is that the object of the statute can be just as effectively carried out by means of a separate trial as by a joint one. And there is no consideration, therefore, which demands a contrary construction. The natural and orderly course is that each claim representing a separate and distinct cause of action shall be separately tried before a jury of the particular claimant's own selection, unhampered by possible disagreement as to continuances; or the jurors to be challenged; or the evidence deemed relevant. And there is nothing in the statute which implies or imposes a different practice.

2. The judgment in this case should have been for the penalty of the bond, to stand as security for each interventing claimant to the extent of his claim, or to be divided pro rata with the others if the bond was not large enough to pay all in full. And had this course been pursued, the present confusion of thought would have been avoided.

Judgment on a bond intended to protect various parties, where one suit only is provided for, should be for the penalty, to be discharged upon payment of the amount recovered on the claim in suit or those subsequently established, on the assignment of additional breaches. 3 Encyc. Plead. & Prac., 670-671; 15 Encyc. Plead. & Prac., 158; Kinney vs. Bell, 127 Fed., 1002; Byrne vs. Hayden, 124 Pa., 175; Keating vs. Peddrick, 240 Pa., 590. In the case of National Surety Company vs. United States, 213 Fed., 429, in this court, this was the course pursued, in a suit, as here, on the bond of a contractor; which establishes a precedent.

The effect of that is this. By the recovery on any one of the claims in suit, the breach of the bond is established, and judgment for the penalty follows as a natural consequence; and this accomplishes a double purpose. Liability on the bond, once for all, is made out, with all which that involves—such as whether the suit was brought too late or prematurely, or whether there is anything which relieves or discharges the surety—and at the same time the particular claim is passed upon, leaving the case open for other claims to be subsequently heard and disposed of in their order. The integral character of the proceedings is thus preserved, at the same time that the independent character of each claim for the purpose of trial is respected. This by all the authorities is the approved and proper manner of procedure in cases of this kind, and is not to be departed from upon any supposed question of expediency.

3. Similar statutes, in a number of states secure to sub-contractors and material men the benefits of bonds given by contractors on public works; and proceedings under them will be searched in vain for any such construction as is here contended for.

The general subject of contractors' bonds and the rights of material men under them, is considered and discussed in 27 Cyc., pp. 305-317. There is apparently no statute in Pennsylvania. But the same thing in substance is effected by means of city ordinances in Lan-

caster (Lancaster vs. Frescoln, 192 Pa., 452) and Philadelphia (Phila. vs. Stewart, 195 Pa., 309). Proceedings in all these instances are peculiarly instructive, for they clearly disclose, contrary to the position taken in the court below, that there is no occasion, in order to make the bond available to different claimants and at the same time to work no injustice to the surety, that the several claimants should be forced into a single trial before one and the same jury, with the resulting confusion and disadvantages which have been alluded to.

4. An analagous practice may also be found in suits on the bonds of pubic officers under the Pennsylvania statutes.

By Act (Pa.) 14 June, 1836, Sec. 6, P. L. 630) there can be but one action on the bond of a public officer such as a sheriff or constable, which action may be brought by any one interested, with the right to others having claims to intervene subsequently. And where a recovery is had by any of the parties, judgment is entered for the penalty of the bond with a special judgment in favor of the party who has recovered a verdict, for the amount recovered; with the right to other intervening parties to have their claims passed upon and a like judgment entered in their favor, the penalty standing as security until it has been exhausted. Commonwealth vs. Straub, 35 Pa., 137; Commonwealth vs. Cope, 45 Pa., 161; Commonwealth vs. Yeisley, 6 Pa. Sup. Ct., 273.

The similarity to proceedings under the Federal Statute, while not exact, is nevertheless enlightening. In both there is but one action to be brought, which may be instituted by any person interested, after which other parties who have claims may intervene and assign additional breaches. And as to each claimant, there is a separate trial, verdict and judgment; all of which goes to prove not only that this is the due and orderly practice, but that no necessity exists for all parties to engage in one and the same trial.

5. When the judgment in favor of The Pennsylvania Marble and Granite Company was reversed by this court and the case sent back for a new trial as to that claim, the whole case was reopened for all purposes and on the re-trial provided for, the present claimant was entitled, if he so desired, to come in, the same as it is argued that he should have done at the original trial, and he could not be cut off from this by any act on the part of the defendant such as a settlement with The Pennsylvania Marble and Granite Company.

By the original order of court to which reference has heretofore been made (record, p. 15), the plaintiff's case was simply directed to be left off the trial list until the contemplated writ of error to the Circuit Court of Appeals had been disposed of and the issues made at the trial, particularly as to whether the case was prematurely brought or not, had been decided. The right of the present claimant to a trial of his case when this had been done was plainly reserved by this order, and the court below could not subsequently repudiate its own action. But more than this, when there was a reversal of the judgment which had been obtained, and a new trial was ordered, it was in effect as if no trial of the case had been had at all.

Suppose the whole case had been reversed and sent back, would the present plaintiff be debarred from taking part in the second trial, because he had not participated in the first? And what is the difference? Or, in other words, what is the distinctive thing pertaining to the administration of the statute that would exclude him in that case?

The two claims—that of the Pennsylvania Marble and Granite Company and of the present claimant—being then before the court and everything else having been disposed of, if the claim of the Pennsylvania Marble and Granite Company had thereupon been called for trial, can there be any doubt in that situation that the present plaintiff could have come in and participated in the trial to the extent necessary to establish his claim? The question of the defendant's liability was

still open, and no greater burden was imposed upon it than had already been done by the intervention of the plaintiff in the action. Neither had the defendant been led to omit anything or to take any step to its detriment because the present claimant had not seen fit to participate in the previous trial. If, then, the right to a trial was open to the plaintiff he could not be deprived of it by any act on the part of the defendant in effecting a settlement and getting rid of the only other remaining party. In fact, that settlement cleared the situation instead of complicating it, for it left the present claim as the only one before the court to be disposed of. It is no answer to say that the present claimant manifested no intention of coming in at any subsequent trial, and has therefore no ground to complain of being deprived of the right to it. Nonconstat that when the time came, he might not deem it advisable to do so, particularly as the question as to whether the suit had been prematurely brought had been taken out of the case by the decision of this court, and the issues involved had been thus correspondingly simplified. At all events, the judgment having been reversed and the case thus opened up for subsequent proceedings, it was left to the claimant to take advantage of the situation and if he was the only party before the court—as he was when the order complained of was made—he had the right to have his case heard independently. Whatever was done by agreement between the defendant and the Pennsylvania Marble and Granite Company by which the latter claim was taken out of the case, certainly could not operate to deprive him of a trial such as he was then entitled to.

James G. Glessner,
R. W. Archbald,
Attorneys for Plaintiff in Error.

No. [redacted]59 JANUARY TERM, 1920.

IN THE

Supreme Court of the United States

C. E. MILLER, Plaintiff in Error,

vs.

AMERICAN BONDING COMPANY, Defendant in Error.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD DISTRICT.

BRIEF OF DEFENDANT IN ERROR.

FRANCIS B. BRACKEN,
934 Land Title Building,
Philadelphia, Pa.,
Attorney for Defendant in Error.

Allen, Lane & Scott, Per., Philadelphia.

In the Supreme Court of the United States.

OCTOBER TERM, 1920. No. 346.

C. E. Miller, Plaintiff in Error,

vs.

American Bonding Company, Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

I. STATEMENT OF FACTS.

The case in which Miller, the plaintiff in error, was an intervening plaintiff, was called for trial on the date appointed, March 29th, 1915. The other plaintiffs, five in number, presented proofs of their respective claims and were awarded separate verdicts, upon which judgments were duly entered.

Miller did not present his claim at the trial, as the District Court in its opinion says, "without apparent reason or excuse" (Transcript, page 37).

In April, 1915, Miller ordered his case on the trial list, but the Court struck it off on motion of defendant in error, pending disposition of a pending motion for a new trial,

without definitely deciding the question raised as to his right to a separate trial.

On November 4th, 1918, nearly four years after the trial, appellant again ordered his case on the trial list, although at that time the judgments entered in favor of the other plaintiffs had been satisfied. The defendant in error filed a motion to strike the case from the trial list, on the ground that

> "The said Act of Congress, under which this action has been brought, contemplates and provides for the institution of only one action and one trial, at which all intervening plaintiffs must present proof of their claims, or be forever after barred from recovery" (Transcript, page 33).

In support of its motion, defendant in error further alleged that the separate trial of the case at such a late date would impose a great burden upon defendant, in procuring the attendance of witnesses for the purpose of establishing its defense to the claim of plaintiff in error.

The District Judge granted the motion for the reasons set forth in an opinion filed (Transcript, page 37).

In this opinion, the learned District Judge expressed the view that the Act of August 13th, 1894, as amended by the Act of February 24th, 1905 (C. 778, 33 Stat. 811), established a procedure according to which all parties asserting claims against a surety in accordance with its provisions, were obliged to submit these claims for adjudication in one trial, and were not, as claimed by the plaintiff in error, entitled to separate trials. He cited U. S. *vs.* McGee, 171 Fed. 207.

The same conclusion was reached unanimously by the Circuit Court of Appeals on appeal (Miller *vs.* American Bonding Co., 262 Federal 103), the grounds for the decision being substantially as stated in the syllabus to the report of the case, viz:—

> "Under Act August 13th, 1894, c. 280, as amended by Act February 24th, 1905, c. 778 (Comp. St., Sec.

6923), providing that materialmen and laborers on public works may join in one action on the contractor's bond, etc., the right of action is a new one, created by statute, and is not based on a common-law right of trial by jury, and a claimant refusing to proceed to trial at the same time as the other claimants, without offering any reason to the trial Court for his refusal, is barred from subsequently maintaining a separate action on the bond."

II. ARGUMENT.

The Act of August 13th, 1894, as amended by the Act of February 24th, 1905, authorizes in the first instance a suit on the contractor's bond by the United States, to enforce any claim which it may have, and in this suit any creditor of the contractor who supplied labor or materials in the prosecution of the work may intervene and have his rights adjudicated subject to the priority of the claim and judgment of the United States. In the event that no action is brought by the United States within six months from the completion and final settlement of the contract, any creditor may, on the terms stated in the statute, bring a suit in the name of the United States on the bond, and in this suit other creditors may in the time stipulated intervene; and it is provided in the Act:—

> "that where suit is so instituted by a creditor or by creditors, *only one action shall be brought*, and any creditor may *file his claim in such action* and be made party thereto within one year from the completion of the work of said contract and not later. If the *recovery on the bond* should be inadequate to pay the *amounts* found due to all of said creditors, *judgment shall be given* to *each* creditor *pro rata* of the *amount of the recovery*. The surety on said bond may pay into court for distribution among said claimants and

> creditors, the full amount of the surety's liability, to wit, the penalty named in the bond less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety shall be relieved from further liability" (see Appendix, *infra*, page 9).

The language of the statute makes it clear that only "one action" can be instituted by creditors, and that there can be but one recovery on the bond for the benefit of all creditors who may become parties, and as this recovery is by the terms of the Act to be distributed *pro rata* in any case where it should be inadequate to pay the amounts claimed in full. it is obvious that the Act had in contemplation but one trial in which the rights of all parties would be finally adjudicated.

In the case of United States *vs.* McGee, 171 Federal 209, the action was brought by the United States and the case by stipulation of the parties tried before the Court, a trial by jury having been waived, and while the case was under advisement a creditor applied for leave to intervene. The application was denied, the District Judge in his opinion saying:—

> "It is quite clear to my mind that under this statute, which provides that the intervener may become a party to the action, the rights of the parties would all be determined in one judgment fixing the rights of the plaintiff and the rights of the interveners as between them and the plaintiff and defendant. Had the intervener come into the action in time, the Court would not have proceeded to trial until all the parties thereto were ready for trial, and the whole case would have been submitted to the same jury for hearing, or to the Court sitting as a jury on stipulation waiving trial to a jury."

The same rule must necessarily be applied where the action is instituted by a creditor rather than by the United

States, and the whole purpose of the Act would be defeated if it be construed to authorize, as the appellant here contends, as many separate trials as there shall be claims presented by interveners.

It is wholly aside from the question to say that as the penalty of the bond is sufficient to cover the judgments already entered as well as the claim of the appellant, there exists no reason why he should not be permitted a separate trial, for the reason that the appellant's rights are purely statutory and must be asserted, if at all, in accordance with the procedure prescribed by the statute. He had the same opportunity as each of his five associate creditors to have his claim passed upon when the action was called for trial, and having neglected his opportunity to then present his claim, he has no right at this late date to revive the action.

Not only is it clear from the language of the statute itself, that but one action and one trial thereof at which all claims would be adjudicated, were intended by Congress, but if there were any doubt as to the meaning of the Act it clearly should be resolved in favor of the view expressed by the Court below, because of the manifest inconvenience and hardship which would result to a defendant surety company from the acceptance of the interpretation for which the appellant here contends.

In the case of any public building contract, a suit on the bond executed in connection therewith almost invariably gives rise to questions which affect equally the several creditors, and if, as the appellant urges, he is entitled to a separate and independent action, then no adjudication of these questions in one trial would preclude a creditor not participating therein from again raising them.

It may fairly be said also that where issues of fact are raised in connection with the several claims of creditors, growing out of the same contract, the contractor and his associates in the management and supervision of the work are usually the witnesses relied upon by the defense, and the inconvenience and hardship in requiring the surety to produce these same witnesses at a succession of trials, when

their testimony could be made available at one trial in connection with all claims presented, are at once manifest.

The argument of appellant is substantially to the effect that under the statute there can be a trial in which any one or more of the intervening creditors may participate, and that if judgment is entered as a result of such a trial, it should be for the full amount of the bond, so that other creditors not participating in the first trial may have their claims adjudicated in succeeding trials and the recoveries satisfied out of the judgment originally entered until it should be exhausted, unless the Court should for adequate reason require that all claims should be disposed of at the first trial.

The principal objection to this theory is that it suggests a scheme for the disposition of claims entirely out of harmony with the scheme provided by the statute itself, which, as already pointed out, contemplates that there shall be but one recovery and that the "amount of the recovery" shall be by the judgments entered thereon in favor of the several creditors, pro rated amongst them in the event that it should prove inadequate to pay the aggregate amount of their claims.

There is no suggestion in the statute that there shall be one method of disposing of the claims in the event that it shall appear that they may in the aggregate be less than the penal sum of the bond, and another method if the trial Judge should determine in advance that the judgments may exceed the penal sum.

The learned counsel for appellant do not indicate their view as to the effect upon claims of creditors not participating in the trial, if on questions raised therein applicable alike to all claims, a judgment for the defendant should be entered. If, as they seem to contend, each claimant has a separate and distinct right of action, and the right to a day in Court independently of the other creditors, it logically follows that he would not be bound by a judgment entered as the result of a trial in which he did not participate.

It was clearly the intent of Congress, as evidenced by

the terms of the statute, to provide for a single adjudication of all claims in the one action provided for, and final distribution of the fund derived from the bond as a result thereof, among all creditors entitled to participate.

The statute effectually consolidates all of the claims in a single action, and provides not only a means for ascertaining the extent of the surety's liability, but in a manner establishes an interpleader proceeding between the plaintiffs themselves, and the whole purpose of the law would be nullified if each plaintiff might have a separate trial of his cause of action.

Mr. Justice Hughes, in

Illinois Surety Co. *vs.* Peeler, 240 U. S. 214,

in construing the statute, says at page 224:—

> "The nature of the obligation is not changed by the fact that there is to be but one action. If the United States brings the action, the persons described are entitled to be made parties and 'to have their rights and claims adjudicated in such action and judgment rendered thereon.' If the United States does not sue within the time specified, they may bring action on the bond in the name of the United States and 'prosecute the same to final judgment and execution.' Any creditor who duly presents his claim in such an action becomes a party thereto with a distinct cause of action: Title Guaranty Co. *vs.* Crane Co., *supra*. The obligation of the surety thus enforced in a single action is a legal obligation to the United States for the use and benefit of the several claimants."

This language would seem to clearly indicate the view of this Court to be that the action contemplated by the statute is a consolidated action, in which there can be but one recovery sufficient to satisfy the claims of all plaintiffs, and necessarily, therefore, but one trial at which all claims must be determined.

The reference in the brief of plaintiff in error to the pro-

ceedings under State statutes or municipal ordinances, requiring bonds for the protection of sub-contractors and materialmen who furnish labor or materials in connection with contracts for public works, is wholly irrelevant, for the reason that in none of the cases referred to was there a scheme of procedure established by the Act of Assembly or ordinance, as the case may be, at all similar to the procedure prescribed by the Federal statute under consideration.

It has been urged by plaintiff in error in his brief that even if, by refusing to present his claim at the original trial of the case he had thereby lost his opportunity to secure a recovery, this opportunity was regained when the judgment in favor of one of the intervening plaintiffs was reversed by the Court of Appeals, and a new trial ordered as to that claim.

In answer to this contention, it is sufficient to say that the new trial was ordered at the instance of the defendant in error, because the District Judge had erroneously refused to give binding instructions for the defendant in respect to the claim of one of the creditors, and this grant of a new trial as to one claim did not reopen the whole proceeding or revive the right of plaintiff in error, lost by his remaining mute when he had the opportunity to present his claim prescribed by the statute. The plaintiff in error was not concerned in the new trial proceeding.

It is respectfully submitted in conclusion that no grounds have been presented in the brief of plaintiff in error, for disturbing the rulings of the District Court or the Circuit Court of Appeals, and that the appeal should be dismissed.

FRANCIS B. BRACKEN,
Attorney for Defendant in Error.

APPENDIX.

AN ACT

For the protection of persons furnishing materials and labor for the construction of public works.

(Act of August 13th, 1894, ch. 280, 28 Stat. L. 278.)

(*Bonds of contractors for public buildings or works—Rights of persons furnishing labor and materials—Remedies on Bond—Proceedings.*) That hereafter any person or persons entering into a formal contract with the United States for the construction of any public building, or the prosecution and completion of any public work, or for repairs upon any public building or public work, shall be required, before commencing such work, to execute the usual penal bond, with good and sufficient sureties, with the additional obligation that such contractor or contractors shall promptly make payments to all persons supplying him or them with labor and materials in the prosecution of the work provided for in such contract; and any person, company, or corporation who has furnished labor or materials used in the construction or repair of any public building or public work, and payment for which has not been made, shall have the right to intervene and be made a party to any action instituted by the United States on the bond of the contractor, and to have their rights and claims adjudicated in such action and judgment rendered thereon, subject, however, to the priority of the claim and judgment of the United States. If the full amount of the liability of the surety on said bond is insufficient to pay the full amount of said claims and demands, then, after paying the full amount due the United States, the remainder shall be distributed pro rata among said interveners. If no suit should be brought by the United States within six months from the completion and final settlement of said contract, then the person or persons supplying the contractor with labor and materials shall, upon application therefor, and furnishing affidavit to the Department, under the direction of which said

work has been prosecuted that labor or materials for the prosecution of such work has been supplied by him or them, and payment for which has not been made, be furnished with a certified copy of said contract and bond, upon which he or they shall have a right of action, and shall be, and are hereby, authorized to bring suit in the name of the United States in the circuit court of the United States in the district in which said contract was to be performed and executed, irrespective of the amount in controversy in such suit, and not elsewhere, for his or their use and benefit, against said contractor and his sureties, and to prosecute the same to final judgment and execution: *Provided,* That where suit is instituted by any of such creditors on the bond of the contractor it shall not be commenced until after the complete performance of said contract and final settlement thereof, and shall be commenced within one year after the performance and final settlement of said contract, and not later: *And provided further,* That where suit is so instituted by a creditor or by creditors, only one action shall be brought, and any creditor may file his claim in such action and be made party thereto within one year from the completion of the work under said contract, and not later. If the recovery on the bond should be inadequate to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery. The surety on said bond may pay into court, for distribution among said claimants and creditors, the full amount of the sureties' liability, to wit, the penalty named in the bond, less any amount which said surety may have had to pay to the United States by reason of the execution of said bond, and upon so doing the surety will be relieved from further liability: *Provided further,* That in all suits instituted under the provisions of this Act such personal notice of the pendency of such suits, informing them of their right to intervene as the court may order, shall be given to all known creditors, and in addition thereto notice of publication in some newspaper of general circulation, published in the State or town where the contract is being performed, for at least three successive weeks, the last publication to be at least three months before the time limited therefor. (28 Stat. L. 278, as amended by 32 Stat. L. 811.)

MILLER *v.* AMERICAN BONDING COMPANY.

ERROR TO THE CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 59. Argued November 8, 1921.—Decided December 12, 1921.

1. The proceeding which the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811, permits to be brought, in the name of the United States, upon the bond of a public contractor, to satisfy private claims for labor and materials, is a single action at law in which the several claimants are not entitled as of right to separate trials. P. 307.
2. In actions at law it is only in exceptional instances and for special and persuasive reasons that distinct causes of action, asserted in the same case, may be allowed separate trials; and the allowance rests largely in the court's discretion. P. 308.

262 Fed. 103, affirmed.

ERROR to a judgment of the Circuit Court of Appeals affirming an order of the District Court striking a case finally from the trial list.

Mr. James G. Glessner, with whom *Mr. R. W. Archbald* was on the brief, for plaintiff in error.

Mr. Francis B. Bracken for defendant in error.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

The American Bonding Company was the surety in a bond given to the United States to secure the performance of a contract to construct a public building, at York, Pennsylvania, and the prompt payment of claims for labor and material supplied to the contractor in the prosecution of the work. The building was completed and a final settlement as between the contractor and the United States was had. No action on the bond was begun by the United States in its own behalf; but an action thereon in the name of the United States was seasonably brought by

Caesar Francini for his use and benefit. He claimed that he had supplied some of the labor and material and had not been paid. In due time others making similar claims intervened in the action for the purpose of presenting their claims, having them adjudicated and realizing on the bond. C. E. Miller was one of the claimants who intervened.

The bonding company interposed affidavits of defense to all the claims, and after issue was thus joined the action was set for trial at a stated session of the court and all the parties were notified. At the appointed session a trial was had, before the court and a jury, in which all the claimants other than Miller participated. Although represented by counsel who was present when the trial was begun, Miller neither asked a continuance nor requested a separate trial; and yet "without apparent reason or excuse" he refused and neglected to submit his claim for adjudication at that time. The jury returned a verdict for each of the other claimants and a judgment giving effect to the verdict was entered, the aggregate of the claims included in the judgment being less than the amount of the bond. The surety sought a review in the Circuit Court of Appeals and that court affirmed the judgment as to all the claims but one, and as to it reversed the judgment with a direction for a new trial. 233 Fed. 364. That claim was then compromised and settled, so the new trial was not had.

Shortly after the trial and verdict Miller caused the case to be put on the trial list for a separate trial of his claim. The bonding company promptly challenged his right to do this, but consented that, if a new trial of the other claims should be ordered and had, his claim might be submitted with the others on the retrial. The court then directed that the case be left off the trial list pending the review in the Circuit Court of Appeals. That review, as we have seen, did not result in a new trial of the

other claims or any of them. More than two years after the review Miller again caused the case to be put on the trial list, and the court, on the bonding company's motion, struck it from the list. The court did this on the ground that the case had been theretofore set for trial and tried, that on that trial Miller had been afforded and had rejected an opportunity to establish his claim and that he was not entitled to another opportunity to establish it. 256 Fed. 545. The Circuit Court of Appeals affirmed that decision, 262 Fed. 103, and Miller sued out the present writ of error.

Whether the court erred in denying Miller another opportunity to establish his claim, and thereby in effect dismissing it, is the question for decision. He particularly insists that he was entitled as of right to a separate trial and was not required to participate with other claimants in a common trial.

The bond was given, and the action was brought, under the Act of August 13, 1894, c. 280, 28 Stat. 278, as amended February 24, 1905, c. 778, 33 Stat. 811. That act contemplates and provides for two kinds of action on such a bond—one brought by the United States in its own behalf; the other brought in its name for the use and benefit of a claimant who supplies the contractor with labor or materials for which the contractor fails to pay. Where the United States sues in its own behalf any one having a claim for labor or material used in the work is accorded a "right to intervene and be made a party" and to have his claim "adjudicated in such action and judgment rendered thereon," subject to a priority which is accorded to the claim of the United States; and, if the recovery on the bond be not sufficient to pay all the claims, the judgment must direct the payment of the full amount due the United States and the distribution "pro rata among said interveners" of the remainder of the recovery. Only when the United States does not sue

within six months "from the completion and final settlement of said contract" may an action in its name be brought by a private claimant for his use and benefit. Where such a claimant sues "only one action shall be brought, and any creditor may file his claim in such action and be made party thereto;" and if the recovery on the bond be not sufficient "to pay the amounts found due to all of said creditors, judgment shall be given to each creditor pro rata of the amount of the recovery." In any suit notice is to be given informing all creditors of "their right to intervene."

This summary of the act suffices to show that all claims under the bond are to be presented, adjudicated and enforced in a single action in which every claimant may intervene and be heard as a party to it. Of course the purpose in this is to avoid the expense, confusion and delay incident to a multiplicity of actions, to enable each claimant to be heard not only in support of his own claim but also in opposition to the claims of others in so far as their allowance may tend to prevent the full payment of his claim, and generally to conserve the common security for the benefit of all who are entitled to share in it.

The right of action given to those who have claims against the contractor is a creature of the act and the mode of enforcement there prescribed cannot be disregarded. *Texas Portland Cement Co.* v. *McCord*, 233 U. S. 157, 162; *United States* v. *Congress Construction Co.*, 222 U. S. 199. We have held that the enforcement is to be in a proceeding at law, and not in equity. *Illinois Surety Co.* v. *Peeler*, 240 U. S. 214, 223. The provision that there shall be but one action, which shall be open to all claimants, and the provision dealing with the judgment to be entered, show that the action is to proceed as a single case. There is nothing in the act indicative of a purpose to accord to each claimant a separate trial as of right; and to do so would make the provision for a single

action of little avail. In actions at law the general practice is to try all the issues in a case at one time; and it is only in exceptional instances where there are special and persuasive reasons for departing from this practice that distinct causes of action asserted in the same case may be made the subjects of separate trials. Whether this reasonably may be done in any particular instance rests largely in the court's discretion. See *Connecticut Mutual Life Insurance Co.* v. *Hillmon*, 188 U. S. 208, 210.

We conclude that Miller was not entitled as of right to a separate trial and that on this record it cannot be said that the court erred in refusing him a second opportunity to establish his claim, and in effect dismissing it.

Judgment affirmed.